

# NOMINATION

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## HEARING OF THE COMMITTEE ON LABOR AND HUMAN RESOURCES UNITED STATES SENATE ONE HUNDRED THIRD CONGRESS FIRST SESSION

ON  
WILLIAM B. GOULD IV, OF CALIFORNIA, TO BE A MEMBER OF THE  
NATIONAL LABOR RELATIONS BOARD

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OCTOBER 1, 1993

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Printed for the use of the Committee on Labor and Human Resources



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# NOMINATION

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FRIDAY, OCTOBER 1, 1993

U.S. SENATE,  
COMMITTEE ON LABOR AND HUMAN RESOURCES,  
Washington, DC.

The committee met, pursuant to notice, at 10:06 a.m., in room SD-430, Dirksen Senate Office Building, Senator Edward M. Kennedy (chairman of the committee) presiding.

Present: Senators Kennedy, Wellstone, Jeffords, Hatch, and Durenberger.

## OPENING STATEMENT OF SENATOR KENNEDY

The CHAIRMAN. We'll come to order.

The National Labor Relations Board is a small agency, but its mission is an essential one, not only for the parties and advocates appearing before it, but also to the larger American society as a whole. It is the agency we depend on to enforce the laws that bring stability to our system of industrial relations.

Every nominee to the National Labor Relations Board who comes before this committee brings a perspective that is informed by the nominee's own experience. In recent years, many were management lawyers. Others had been in Government service prior to their being nominated. Few, if any, have had the range of experience that Bill Gould will bring to this position. He has the distinction of having been a practitioner on all sides of labor issues.

He has represented management for 3 years at a distinguished law firm in New York City. He has represented the United Auto Workers in Detroit for a year. For 2 years, he was an attorney for the National Labor Relations Board, assisting and drafting Board decisions for then Chairman Frank McCulloch and member Howard Jenkins—Mr. Jenkins is with us today—both of whom were originally appointed by President Kennedy and served long and respected terms at the Board. The varied experience he gained in each of these roles will give him a unique and rich perspective as chairman of the Board.

In addition to this extensive background as a practitioner, for the past 25 years he has worked as an academic and an arbitrator, and this service has added immensely to his wealth of knowledge and experience. Professor Gould has taught labor law to hundreds of law students; his research and writings have earned him a distinguished chair at Stanford Law School, one of the most prestigious law schools in the country. Professor Gould could have confined his activities to Stanford, but instead, he chose to become active as an

arbitrator and to assist labor and management in reaching amicable resolutions of their disputes.

Professor Gould's arbitration experience is probably the best indicator of how he will perform in the role of member and chairman of the National Labor Relations Board. He has sat as a sole arbitrator on cases and together with the labor and management representatives as the neutral member of tripartite arbitration panels. He has sat on numerous grievance arbitration cases deciding whether employees should be disciplined under the terms of the contract and the custom of the shop floor and whether various management or union acts violated the parties' collective bargaining agreement. As an arbitrator in "interest arbitration" cases, he has had to make difficult choices as to the terms of the contract he should impose when labor and management could not agree on those terms themselves.

Over and over, both labor and management have placed their trust in Bill Gould to resolve their disputes. That is the most persuasive evidence the Senate could have that Bill Gould will be a fair, impartial, and judicious chairman of the National Labor Relations Board.

I hope he will spend at least a short time this morning sharing with us his experiences resolving disputes among the managers and players in professional sports. He appears to be unscathed from those disputes. We have received letters praising his impartiality from representatives on both sides.

Bill Gould has the rare combination of experience, independence, impartiality and balance which will make him an outstanding member and chairman of the National Labor Relations Board. And if there were any questions about his judgment, he solved them for me when I found out he is a Boston Red Sox fan. [Laughter.]

Senator DURENBERGER. That presents me with a problem, Mr. Chairman.

The CHAIRMAN. Just before recognizing Senator Durenberger, I want to mention that Senator Kassebaum wants to extend her apologies to Mr. Gould. She has a statement for the record and wants the record kept open for a week, and she will submit written questions.

All of us know what an involved and active member of this committee she is. I spoke with her a little while ago, and she is not feeling quite up to speed this morning, so she wanted me to extend her regrets. I am very grateful to her for letting us move ahead with the hearing. I know she is tireless in meeting her responsibilities as the ranking minority member of the committee, and we certainly would want to accommodate her particularly when she is feeling under the weather. But she indicated that we should go ahead, and I am very grateful to her for that.

[The prepared statement of Senator Kassebaum follows:]

#### PREPARED STATEMENT OF SENATOR KASSEBAUM

Mr. Chairman, Professor Gould has spent many years in the field of labor relations and obviously is well-versed in the workings of the National Labor Relations Board.

As a professor at Stanford Law School, he has written extensively on labor issues and those publications were very clear about

the direction in which he wants to take our system of labor relations.

Within the last year, Professor Gould published a book, entitled *Agenda for Reform*, in which he sets forth his vision of the labor law reform for our country. I find many of the ideas in that book quite troubling.

Many of the changes advocated in that book can only be accomplished through action by Congress or the Supreme Court. But others are clearly within the Board's purview.

The fact is that the NLRB has broad authority and discretion to shape the law. At this time, our economy can ill-afford the disruption and uncertainty that will result if the Board is used as a platform for labor law reform.

Regardless of whether the changes to the law can be made through the Board or by Congress, I must question whether Professor Gould, in good conscience, can preside over the independent agency when he has so severely criticized the underlying statute that the agency oversees.

The CHAIRMAN. Senator Durenberger.

#### OPENING STATEMENT OF SENATOR DURENBERGER

Senator DURENBERGER. Mr. Chairman, let me start with baseball, because I can't add a thing to your statement. It was a perfect statement, and it says a lot about a splendid individual, and one of the things I asked Bill Gould after I met with him was, "Why do you want to leave all of that for this?"

I was impressed by how much people you don't expect to know about baseball do know about baseball, and I won't argue about his preferences in teams. But when you mentioned the Sox and I think of the Twins, I put it in the context of the Frank Viola trade. I mean, we win the World Series in 1987, and that's the biggest thing that ever happened in anybody's life in Minnesota, and Andy McPhail gets rid of Frank Viola. So somewhere during the following year, Andy was here in Washington, DC, and there is a little dining room downstairs that the Senators all know about, which is sort of like the roundtable at some of these clubs, where the guys who don't have anybody to take them to lunch go to lunch with each other sort of thing. Well, this is what some Senators do.

And there are a couple of wonderful, older gentlemen who work there, and they are very quiet and never share what's on their minds or anything. So I just opened the door to let Andy see the Republican Senators sit at one table, and Democrat Senators sit at the other, and I just wanted him to see this phenomenon.

So one of these elderly gentlemen was there, and I introduced Andy to him. I said, "This is Andy McPhail, the general manager of the Twins." And this guy, who sort of shows his age, is sort of bent at the shoulders a little bit, snaps up like this, and in a 5-minute tirade, takes on the manager of the Twins to tell him what a lousy trade that was—and he knows everything about the Twins, he knows everything about Frank, he knows everything about everything. And he had this thing totally analyzed.

So I learn a lot from those experiences, and I am reminded of them, that there is a quality about people whose expertise shines, as the chairman says yours does, in your particular field of profes-

sional endeavor, but who also have a passion for the American pastime. It says a lot about them.

I do have a different statement that I will put in the record, Mr. Chairman.

The CHAIRMAN. It will be so included.

[The prepared statement of Senator Durenberger follows:]

#### PREPARED STATEMENT OF SENATOR DURENBERGER

Mr. Chairman, I am honored to be here for today's hearing on the confirmation of Professor William B. Gould IV. I am looking forward to today's testimony.

The National Labor Relations Board must prevent and remedy unfair labor practices by employers and labor organizations, and conduct fair employee representation elections. As such, it is charged with the supremely difficult task of assuring the peaceful resolution of labor-management disputes, protecting the rights of both employees and employers, and ensuring that American industry is prepared to meet the challenges of the competitive global marketplace.

I have reviewed Professor Gould's background and writings. I have met personally with Professor Gould. And I must say, I have been very impressed by his scholarship, his substantive knowledge of labor relations law, his profound commitment to public service, and his passion for the American Pastime.

I hope today's hearing will shed further light on Professor Gould's qualifications to serve as Chairman of the National Labor Relations Board.

The CHAIRMAN. Thank you very much.

The nominee is accompanied here this morning by some of my very good friends, both in the Senate and in the House. We'll start off with our colleagues from California, and I'll recognize Senator Boxer for whatever comments she wishes to make.

#### STATEMENT OF HON. BARBARA BOXER, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator Boxer. Thank you very much, Mr. Chairman.

Mr. Chairman, you have always been very sensitive to witnesses who appear before you, but how you could, before Senator Feinstein and I and Congresswoman Eshoo, speak out in behalf of Bill Gould to tell us he is a Red Sox fan when the San Francisco Giants are in the fight for their lives—but I will forgive you, Mr. Chairman, and proceed as if you never said that, because even though you have told me that, I am still extremely enthusiastic about Bill Gould, for a very good reason.

I would ask that my statement be put in the record, and I'll summarize it, if that's all right with you.

The CHAIRMAN. All the statements will be included as if read.

Senator Boxer. Obviously, we are delighted with this nomination, not only because Bill Gould is a Californian, but because he brings a sense of fairness and intelligence to the NLRB. You will hear a lot about Mr. Gould's views. He is a prolific author of many scholarly and popular press articles. But I think the one theme that stands out for all of us is his strength, because he really has a sense of fairness for democracy in the workplace; he understands



the needs of management and the needs of labor, which is essential.

As a member of the National Academy of Arbitrators, Mr. Gould has presided over 200 cases in nearly a quarter of a century. First admitted to the Academy at the age of 33, one of the youngest members ever to join, that broad range of experience has taught him to find that delicate balance between competing interests. He realizes the critical role labor-management cooperation will play as our industries face restructuring. He supports easing restrictions which prevent companies from forming more labor-management committees to work out their differences, before they lead to strikes, so we can avoid strikes. And he knows as a baseball fan and as an arbitrator, in the 1992 salary disputes in major league baseball, that it is very hard to hit a home run as management if your players are not willing to run around the bases.

A Stanford law professor since 1972, Mr. Gould has also studied all aspects of our labor laws and their effects on this Nation. And I think in this combination, the President has combined the independence of the scholar and yet the practical experience of the negotiator.

In closing, I think the comments of a Bay area lawyer say it very, very well, when he said: "What you are going to see is somebody whose fundamental interest is protecting employee rights, but that is counterbalanced by the reality that if you don't have employers, you don't have employees."

So thank you very much, Mr. Chairman, for the opportunity to add my voice to this wonderful nomination.

The CHAIRMAN. Thank you very much.

Senator Feinstein.

#### **STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA**

Senator Feinstein. Thank you very much, Mr. Chairman.

I would like to add my words to those of my colleagues and particularly commend Professor Gould, who hails from my alma mater. And I would like to ask him a question: Are you going to trade in the '49ers for the Redskins?

Mr. GOULD. Never, never. And I'm for the Giants in the National League, also.

Senator Feinstein. That's very important, because Stanford now has, of course, Bill Walsh as coach, so we expect to see the Stanford football team become one of the great college teams.

It is also a pleasure for me to introduce Bill Gould to you, Mr. Chairman and members. My colleague has outlined his scholarly pursuits and his practical experience in labor law, and I think what distinguishes him is the fact that he recognizes the challenges that the modern labor movement has and the need to really develop a new era of cooperation to improve our country's competitiveness and also our workers' living standards.

Before he taught at Stanford, he was a visiting professor at Harvard and a number of foreign institutions, including Cambridge and the University of Tokyo.

Among his books and articles are some interesting titles: "A Primer on American Labor Law"; "Black Workers in White Unions:

Job Discrimination in the United States"; "Japan's Reshaping of American Labor Law"; "Strikes, Dispute Procedures and Arbitrations: Essays on Labor Law."

In his most recent book, "Agenda for Reform: The Future of Employment Relationships and the Law," Professor Gould has laid out an ambitious plan for revitalizing labor-management relations and reforming the NLRB. He is a firm believer in worker-management cooperation and suggests that labor law should be amended to encourage employee involvement teams and resolution of disputes without Federal or State intervention.

He has been a member of the National Academy of Arbitrators since 1970 and is often praised by both labor and management. And I might say, having been mayor of a city and having gone through I would say maybe 2 dozen big strikes in my day, that it is very difficult to find someone who is praised both by management and labor—and when you do, you generally have somebody who is very, very unusual. I think that is the capability that he will bring to the NLRB. I believe he is the right person at the right time in what has been a deteriorating mission over the past decade or so, with the standards of working men and women deteriorated, the need for competitiveness, the need for people who can bring together management and labor and really forge some of the work ethics of the future.

I think this is the man for that job, and I am very pleased to introduce him and recommend him to this distinguished committee.

The CHAIRMAN. Thank you very much.

We are delighted to have our colleagues and friends who know you speak so strongly in your favor, and we are glad to have them remain with us through the course of the hearing, but we know they have other responsibilities, so if they have to leave, we will understand.

We welcome also our two good friends who were good enough to come over from the House of Representatives, individuals whom we have worked with over a long period of time.

Congressman Clay, we're delighted to hear from you at this time.

#### STATEMENT OF HON. WILLIAM CLAY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSOURI

Mr. CLAY. Thank you, Mr. Chairman and members of the committee.

I am honored to appear here this morning on behalf of the members of the Congressional Black Caucus to join in the introduction of Bill Gould and to express our unequivocal and enthusiastic support for his nomination to become chairman of the National Labor Relations Board.

I am especially pleased to be a part of this panel as we join him before the committee because this is a gentleman who brings exceptional intellect and a body of experience in this arena that is without peer.

I have known of Bill Gould throughout my public career, and I am acquainted with his record of service in our communities and the Nation as a whole. I have been asked by my colleagues in the Congressional Black Caucus to appear before you today to State our support for this nominee in the strongest possible terms. If

ever there was an individual who embodies both the breadth of knowledge and a wealth of experience in the resolution of labor disputes, it is Bill Gould.

In more than 200 single instances, he has been selected by both management and labor to function as an arbitrator and mediator, demonstrating his reputation as an even-handed and fair negotiator.

His academic preparation speaks for itself, the particulars of which have been presented to you. His are sterling credentials which command respect from both sides of the aisle—the leadership of corporate America and organized labor. The diversity in his work experience includes a unique portfolio of cases where he has successfully represented clients against both union representatives and employers in major employment discrimination class actions.

A member of the National Academy of Arbitrators since 1970, an acclaimed legal scholar and prolific author, Bill Gould has distinguished himself in every field of endeavor which touches on labor-management relations.

Mr. Chairman, time limitations beg for brevity, but I would be remiss if I did not address the challenges which have been leveled at this exceptional nominee. There are those who would have you believe that Bill Gould has such close ties to organized labor that he would be rendered ineffective in this crucial role. To his detractors, we say without reservation: Bill Gould is a man whose every energy has prepared him to hold this office. His record can withstand the scrutiny and challenge of every standard of fairness and objectivity. His scholarship, his negotiating skills and his brilliance are character references in their own right.

As members of the Congressional Black Caucus, we ask your expeditious affirmation of this nomination and final confirmation of Bill Gould as chairman of the National Labor Relations Board.

I want to thank you, Senator and the committee for allowing me this opportunity to speak.

The CHAIRMAN. Thank you. You are very good to come by, and we appreciate very much that strong endorsement from yourself and from the caucus.

I am delighted to welcome a wonderful personal friend of mine, a distinguished Congresswoman from Northern California, a person whose good judgment I have extraordinary appreciation for, since she supported me in 1980.

Ms. ESHOO. I still celebrate that, Senator.

The CHAIRMAN. Anna, we're glad to have you.

#### **STATEMENT OF HON. ANNA G. ESHOO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA**

Ms. ESHOO. Good morning, Mr. Chairman and members of this distinguished committee. It is an honor to be here this morning and a personal privilege as well to be before you committee, Mr. Chairman, and to be here to introduce you to Mr. William Gould, the Charles A. Beardsley Professor of Law at Stanford University and truly one of the top legal scholars in our Nation.

His academic credentials are far too numerous for me to enumerate. Suffice it to say that his impeccable record truly speaks for itself.

Throughout his distinguished career, Professor Gould has been a prominent mediator, and I think that this point needs to be underscored again and again, because the skills that he has gained and the respect and the regard that he has of his peers throughout the country in this area, I believe will serve the National Labor Relations Board as its chairman exceedingly well.

As a member of the National Academy of Arbitrators since 1970, Professor Gould has arbitrated and mediated more than 200 labor disputes, including the 1989 wage dispute between the Detroit Federation of Teachers and the Board of Education of that city, as well as the 1992 salary disputes between the Major League Baseball Players Association and the Major League Baseball Player Relations Committee, which my colleagues mentioned earlier.

As the representatives of the 14th Congressional District of California, I am proud to both introduce and recommend Professor Gould to you and to your committee, Mr. Chairman.

I would like to add that in my comings and goings at Stanford University over the years, there is an office on a certain floor at the law school, where you can barely get in and out of that office because of all the piles of papers that are stacked there. It is the office that students, I believe, most frequent, because they have sought his counsel, they understand his wisdom, they have benefited from this gentle, intelligent man and his great intellect. And I have no question that he will serve this Nation exceedingly well and make the workplace a better place for all of us.

So thank you for the privilege of being here before you this morning in this distinguished committee, and I would like to submit my statement for the record.

The CHAIRMAN. It will be included, and thank you very much.

[The prepared statement of Ms. Eshoo follows:]

#### PREPARED STATEMENT OF REPRESENTATIVE ESHOO

Mr. Chairman, I would like to submit my statement for the record and request 5 days to revise and extend my remarks.

Mr. Chairman, I have the great pleasure of introducing to you Mr. William Gould, the Charles A. Beardsley professor of law at Stanford University and one of the top legal scholars in our Nation.

His academic credentials are far too numerous for me to enumerate—suffice it to say that his impeccable record speaks for itself.

Throughout his distinguished career, Professor Gould has been a prominent mediator, which is critical for any chairman of the National Labor Relations Board.

A member of the National Academy of Arbitrators since 1970, Professor Gould has arbitrated and mediated more than 200 labor disputes, including the 1989 wage dispute between the Detroit Federation of Teachers and the Board of Education of that city as well as the 1992 salary disputes between the Major League Baseball Players Association and the Major League Baseball Player Relations Committee.

As the representative of the 14th Congressional District of California, I am proud to both introduce and recommend Professor Gould to you and your committee, Mr. Chairman.

I know that his background, keen intellect, and outstanding leadership qualities will serve our country well. Thank you.

The CHAIRMAN. We appreciate both of you being here. We welcome your continued attendance, and understand if you have to be on your way.

Mr. Gould, you're off to a wonderful start.

Mr. GOULD. I feel that I should just remain silent now, Senator.

The CHAIRMAN. It's all downhill from here, we hope, but we're not sure that will be the case. But anyway, we'd be glad to hear from you now.

### **STATEMENT OF WILLIAM B. GOULD IV, NOMINATED TO BE CHAIRMAN, NATIONAL LABOR RELATIONS BOARD**

Mr. GOULD. Thank you, Senator Kennedy, members of the committee. It is a pleasure and an honor to be here with you today, and I want to thank Senator Feinstein and Senator Boxer and Congressman Clay and Congresswoman Eshoo for their very kind and generous introductions.

I will not go through my entire statement, which you have already noted is part of the record, Senator.

I would begin by saying that, as you know, President Clinton nominated me to be a member of the National Labor Relations Board on August 5 of this year. I believe it was transmitted to the Senate on August 6. And he has expressed his intention to name me as chairman if and when I am confirmed by the U.S. Senate.

I am honored by President Clinton's expression of the confidence in me, and I am grateful to him for nominating me. If I am confirmed by the Senate as a member and named by him as chairman, I shall do my best to leave a 5-year record at the Board which is of the highest quality professional competence and dedication; in short, one which will reflect upon the Clinton administration well and its own professional judgment.

So that you will know a little better who you have before you, I would like to provide you with some information about me, my views, and my aspirations for my tenure at the Board.

I was born in Boston, MA on July 16, 1936, and I was raised in Long Branch, NJ from 1940 to 1954. Prior to residing in California, I lived in Detroit where, as noted, I was on the staff of the Auto Workers in New York, where I represented management and then in Washington, DC, where I was with the Board. I have resided in Stanford, CA since 1972.

My great-grandparents, the first William Benjamin Gould, of Wilmington, NC, and Cornelia Read of Charleston, SC, were slaves. My great-grandmother fled from South Carolina to Nantucket, MA in the 1850's, before the Civil War, and my great-grandfather set sail from Wilmington with seven other contrabands to board the Union ship, the U.S.S. Cambridge on September 22, 1862, and he was mustered into the United States Navy on October 1 and served with the Navy until his honorable discharge in Charlestown, MA on September 26, 1865.

From 1871 on to his death in 1923, he resided in Dedham, MA. A mason by trade, he was one of the founders of the Episcopal Church of The Good Shepherd in Dedham, where I was baptized. His six sons, my grandfather, William B. Gould, Jr., and five great uncles, followed in his footsteps in the United States military, my grandfather as a sergeant in the 6th Regiment of the Massachusetts Volunteers in the Spanish American War and my great-uncles as officers in France in World War I.

These men were the backbone of our country, and their commitment to our Nation, their views about religion and life here on this earth shaped my views and philosophy since I was a small child.

In truth, their views, particularly as reshaped and transmitted to me by my parents, induced me to focus upon the law as a career in the early 1950's.

If I have contributed anything of value to my fellow man and woman, it is because of my parents, Mrs. Leah Felts Gould and William B. Gould, III, now deceased. They provided me with unqualified love, an understanding of how they would not allow the racial discrimination visited upon them and their forebears to defeat them, and the sense that the horizon was boundless if I applied myself.

No event has been professionally more significant for me than the U.S. Supreme Court's declaration that segregation in public schools was unconstitutional when I was a high school senior. Then, as now, the law has been a significant vehicle to diminish inequity in our society and unfairness in our society.

I came to the law as a profession because the rule of law has represented a beacon of hope against centuries of injustice in our country and because I see it as a principal decisionmaking process which is above and beyond day-to-day immediate political passions.

In my adult professional life, I have practiced law, and that part of my work has been noted by others. I have argued before the United States circuit courts in the District of Columbia, the third, the sixth, and the ninth circuits, and I have represented labor and management in the negotiation of agreements as well as in the practice of law.

Prior to my moving from the role of private practitioner and the academic arena, I began to arbitrate, mediate, engage in fact-finding in a number of disputes in both the public and private sector. I have ruled in favor of employers in approximately 59 percent of the cases where the award was clearly in favor of one party or the other, and when you count so-called split decisions—that is to say, where neither side is a clear winner or loser—I have ruled in favor of management in 54 percent of those cases in toto, and I have served on a number of panels.

As has been noted here, Senators, a genuine highlight of my arbitral career was my role in resolving baseball salary disputes in 1992 and 1993. Baseball salary arbitrators are instructed to conclude the cases expeditiously, and I have done so. But I must confess to this committee that it has been my desire to hold those cases forever, so fascinating is the statistical treasure trove of evidence presented and the use to which it is put by these very skilled advocates for the parties, the Major League Player Relations Committee and the Major League Baseball Players Association.

These arbitrations, along with my baseball journalism of these past 7 years, which has not been alluded to thus far, have permitted me to obtain proximity to both management and players of the team that I have passionately supported since 1946, the Boston Red Sox.

And I should say, Senator Boxer, that I am very much emotionally involved in what is happening this week with my good pal, Dusty Baker, whom I really like very much and I count as a close personal friend. I don't know what happened to us last night, but I hope the Giants prevailed, because if they did, we would be in a virtual tie for first place.

Of course, in the World Series between the Red Sox and Giants, I'll have to beg your indulgence on that.

Should the Senate confirm me, it would bring me within real striking distance of Fenway Park, the beautiful ball park that I have adored ever since I was a sandlot youngster participating in family summer excursions to Dedham and listening to the short-wave radio that my father fixed up for me in New Jersey so that I could hear first-hand the feats of the great, really the greatest as far as I am concerned, that there have ever been—Williams, Doerr, Pesky and Dominic DiMaggio, and the fans' reaction to Eddie Pelligrini's foul balls as they would climb the screen behind home plate. They still have the same reaction to those foul balls behind the screen today in Fenway, and it is one of the many unique characteristics of that ball park.

In all industries, Senators—in baseball, automobile factories, or high-tech Silicon Valley plants—certain principles remain constant in the arbitration process. Because an arbitrator is a creature of the collective bargaining agreement, labor and management, the arbitrator must be careful not to exceed the boundaries established in that contract by the parties themselves. Above all else, the arbitrator must be faithful to the intentions of the parties who have appointed him or her to interpret their agreement.

As members of this committee, you are familiar with the fact that practically all arbitrations and mediations result from labor and management voluntarily selecting a third party neutral for the role that I have filled in these cases.

The test of success is the market, that is to say, the selection process, employed by labor and management. As the committee and members know from correspondence sent to it by those who have represented me before in labor and management this past quarter of a century, I have been viewed by both parties as acceptable as a neutral in a wide variety of disputes. In only two instances that I am aware of have my awards been challenged in court, and ironically, those two cases were ones in which I ruled in favor of an employer.

My work as the chairman of the Board will be of a quasi-judicial nature and will involve me as an impartial—the same role that I have played as an arbitrator—to resolve conflicts arising under this statute, the National Labor Relations Act, in a fair and evenhanded manner within the limits of the law established by Congress.

In the past, I have written a number of books and articles for professional journals, periodicals, newspapers, extensively expressing my views on the shape that national labor policy should take if Congress should amend the National Labor Relations Act or other statutes. If confirmed by the Senate as one of five voting members of the Board, in my new role, my charge is to interpret existing law as it is written.

The critical difference between Professor Gould and Chairman Gould is that in the latter capacity, my responsibility as one of five decisionmakers is concerned solely with the interpretation of the law as it is presently written.

More than a quarter of a century of arbitral experience makes me familiar and comfortable with the distinction between the role of law reform proponent on the one hand—the role of the profes-

sor—and a neutral finder of fact and applier of existing law on the other—the role of the chairman of the Board and its other members—the latter being more akin to the arbitral process.

Both as an arbitrator and chairman of the Board, my role is to decide cases based upon the facts and relevant law. In neither capacity is the fashioning of legislation part of the job description. That is the appropriate role for Congress.

As chairman, I plan to, if confirmed by the Senate, reach out and consult with both labor and management representative about a wide variety of procedural matters so that the Board may implement the public interest more effectively.

If I am confirmed by the Senate, I will have a number of priorities as chairman. The first is to make the Board a more efficient administrative agency and to expedite the administrative process in both the representation and unfair labor practice arenas. I will consider the use of firm timetables, and I shall attempt to lead by example and encourage Board members to spend the overwhelming portion of their time right here in Washington, DC to work on the business at hand.

I believe that my chairmanship will usher in an environment of collegiality and civility in which respect for the views of one another and the values of hard work are both promoted.

A second priority of mine, Senators, will be informal dispute resolution. The Board has always had a very good rate of informal settlement or conciliation of cases as a general proposition. But the success of the Board has been substantially limited to the time prior to the issuance of a complaint by the general counsel.

I would like to see more effective discovery and settlement efforts by the administrative law judges subsequent to the issuance of the complaint, the ALJs being directly responsive to the Board side. I plan to initiate discussions with other Board members as well as the chief administrative law judge to this end. This could be a factor, in my judgment, in reducing delay.

If confirmed by the Senate, a third objective would be to continue with the difficult task of assuring that the Board's credibility in the courts and with the public is the very best possible. My overriding objective during the coming 5 years is to eliminate or substantially diminish the polarization between the parties and to make the Board into an agency which has the full confidence of both labor and management, the Federal judiciary, as well as the general public.

The Board, like arbitrators, must be perceived to be impartial and neutral. I shall bring to bear the skills that I have employed during the past quarter of a century as a third party neutral in arbitration, mediation and fact-finding. In this connection, although I am only one of five, I shall attempt to lead the way in achieving as much unanimity—again, a need that we sorely have at the agency—as much as possible.

Senator Kennedy, members of the committee, I welcome your questions, your comments, and your advice. I look forward to working with you in the future.

The CHAIRMAN. Thank you very much.

I think you have answered many of the questions that come to mind. I suppose there are some who might be concerned that, given



your writings, you really cannot be open-minded or fair-minded. You have described in your statement the difference between being a professor and putting out ideas and being on the Board, or chairman of the Board, and being called upon to make decisions on the basis of the record and the law. But I wonder if you would like to elaborate on that at all, because I think there will be questions, given the volume of your writings on a wide range of different subjects, which have been enormously interesting and provocative. People will wonder whether you really can be fair.

I have here a document, published by the Bureau of National Affairs publication, analyzing your record of decisions in disputes you have arbitrated, and it shows you decided 50 percent of those cases for management, 29.2 percent for the union, and 20 percent were split decisions. In discipline cases, you decided 35 percent for management, 28.6 percent for the union, and 35 percent were split. In nondiscipline cases, you decided 70 percent for management, 30 percent for the union, and zero split.

What do you say to those who wonder whether you can really call it according to the law, and won't be swayed by your own predisposition on many of these public policy questions?

Mr. GOULD. I think, Senator Kennedy, there have been a number of arbitrations where, if I could decide the case according to my own predilections, if I could resolve the case according to my own sense of what is fair and unfair, I might have gone in a particular direction. But I have always looked at a number of factors, first and foremost the language of the collective bargaining agreement itself, in determining the question of whether or not there has been a contract violation in a given case. And I have heard out all parties both in terms of allowing relevant evidence to come before me and argument to be made on the basis of that, and briefs if the parties so wish.

The CHAIRMAN. Let me ask you about your position on the Dunlop Commission. You were selected by Secretaries Reich and Brown to serve on the Dunlop Commission to study and make recommendations on labor law reform. What is your current status in relation to that commission?

Mr. GOULD. Yes, sir. I have sent a letter to both Secretary Reich and to Secretary Brown, stating that I would suspend my involvement in the commission while these hearings are taking place and while the matter of my confirmation is pending before the U.S. Senate. And should the U.S. Senate confirm me, I shall simultaneously with that confirmation resign from the Dunlop commission. This is what I have stated in my letters to both Secretary Reich and Secretary Brown.

The CHAIRMAN. Could you review with us what you consider to be the most pressing institutional issues at the Board?

Mr. GOULD. I think one of the pressing institutional concerns is this old problem which seems to have become in various periods worse than it has been in the past, of delay.

I want to see the Board handle cases promptly and expeditiously, both representation and unfair labor practice cases. Justice delayed is justice denied, but also from the perspective of all parties, it is in the interest of all parties to get in and out of the Board's proc-

esses as quickly as possible and go about their own lives as they would wish to.

A second concern, Senator, that I have is in the area of informal dispute resolution. I would like to see the administrative law judges much more involved. I might say in connection with the first that I would like to look at this issue of rulemaking and the question of whether it should apply beyond the hospital industry, which is what the U.S. Supreme Court has approved of 2 years ago in the American Hospital Association case.

The CHAIRMAN. Thank you.

Senator Jeffords.

Senator JEFFORDS. Thank you, Mr. Chairman.

That was certainly an excellent statement, one of the best I have heard in a nomination proceeding, and I commend you on that. We had a very interesting discussion the other day as well, and that was very helpful.

I would say that anyone who has had that loyalty and long dedication to the Red Sox is used to adversity and disappointment. [Laughter.]

The CHAIRMAN. From August on. That's what it comes down to.

Senator JEFFORDS. One of the most disappointing things I have done in my life was the first baseball I took my son to was the Baltimore Orioles, and so every time I get optimistic, he just says: "1918." That was, of course, the last year the Red Sox won the World Series. But anyway—

Mr. GOULD. But it's going to happen again sometime soon, Senator.

Senator JEFFORDS. I know. I have faith.

Senator HATCH. Probably in 2018. [Laughter.]

Senator JEFFORDS. The nominating process is never entirely comfortable, and I'm sure the people on my side will have some questions for you that are perhaps difficult. But I would say that you are off to an excellent start.

I also have just a couple of questions that I would like to ask you. We tend to have a bent toward making sure the business end of the spectrum is treated with the fairness which is required under the National Labor Relations Board, and obviously, your appointment is very essential to that process. So first of all, one of the new directions that the OSHA reform bill is taking—one of the contentions that has been raised is that the mandatory health and safety committees will become in-house avenues for union organizing efforts at those employers where no unions are in place.

Your writing suggests that you also see this possibility and view it as a positive development. Is this an accurate statement of your views, or do you wish to comment or elaborate at this time?

Mr. GOULD. Yes, Senator. I think the existence of employee committees can take a number of avenues. I have advocated for some time the idea that employers ought to, voluntarily, long before the OSHA amendments were discussed, be able to establish relationships with their employees through committees. This was on a voluntary basis. And this continues to be my view with regard to the National Labor Relations Act.

I think that this is intrinsically valuable because first of all, the workers ought to know more about the way in which the business

that they are employed in operates. That is the only way we can have good, constructive relationships and that, in my judgment, is the best way that American industry can be competitive, particularly in this globally interdependent economy that we operate in.

So that intrinsically, on that basis alone, I see committees as a very valuable institution, sir.

Senator JEFFORDS. You may have already answered this, but one of the great concerns that many have, both labor and management, is the backlog of cases and the slowness of getting expeditious treatment of their problems. First, is that a problem, and if it is, how do you foresee trying to alleviate it?

Mr. GOULD. I think it is a great problem. We have more representation cases taking more than 4 months—appreciably many more than took 4 months in the 1960's. I think it is intolerable to have cases that exceed 4 months, particularly involving representation petitions. These matters, from the perspective of both employees and employers, should be resolved as quickly as possible.

I would like to look into a variety of ways of trying to deal with this. I would like to, as I say, consider the issue of firmer timetables. It may be that consideration of the rulemaking matter which I alluded to in response to a question to a question Senator Kennedy put to me may be in order in this connection as well.

Senator JEFFORDS. I'd like you to expand a little bit more on the rulemaking authority and where you see it might be utilized, other than your comments to Senator Kennedy.

Mr. GOULD. Well, I think the use of rulemaking in connection with representation matters is particularly important because it can diminish substantially delays that would otherwise occur over controversies about what constitutes the appropriate unit. An enormous amount of time is consumed in litigating these kinds of issues. This is an issue that of course the parties under the existing system have every right to litigate, and counsel representing employers would be derelict in their duty if they did not try to defend the interests of their employers where there is ever any controversy regarding appropriate unit.

But it seems to me that what has happened in the hospital industry suggests, and the U.S. Supreme Court's approval of the Board's authority in the rulemaking arena suggests that we might want to look at the exercise of our rulemaking authority in other industries. I don't know at this particular juncture, Senator, which industries the use of such authority might be most effective in. But that is something that could help expedite the process, and I would certainly like to consider it if I should be confirmed as a member of the Board.

Senator JEFFORDS. I would just like to say that Senator Kassebaum was looking forward to be here today but unfortunately was unable to make it. She is ill, not seriously, but is unable to be here this morning.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Durenberger.

Senator DURENBERGER. Thank you, Mr. Chairman, and thank you, Professor Gould.

I just have to make one observation, and I'm sorry I didn't make it while Senator Feinstein was here. But she thinks Bill Walsh is a great football coach; I think you lost a great football coach at Stanford when Denny Green came to Minnesota.

Mr. GOULD. Yes, yes, so do I.

Senator DURENBERGER. And we have not seen the best of Denny Green yet, and hopefully, we will, a Sunday at a time.

This is a question I want to ask the chairman as well as you. Sometimes there is a time to deal with issues, and there is not a time to deal with these issues. Maybe the last 12 years have not been a good time to deal with the issues raised by your response to the chairman's question on what are the most pressing problems. Your answer was "delays."

I went back and did a little digging into previous confirmation hearings, and back in 1977 during the confirmation hearings for chairman John Fanning, Senator Jake Javits from New York sat here and asked Mr. Fanning, "What do you see as the principal challenges facing the Board?"

And the appointee, Chairman Fanning, answered, "I have said for many years that I think the number one problem of the Board is delay." That was 1977.

Until we can dispose of the Board decisions in an unfair labor practice in 6 months, we are not doing the job we should be doing. As I understand it, at the beginning of the decade of the 1980's—there is a GAO report out on this subject, I guess—GAO said that the average time from filing of the charge to determination of an unfair labor practice was about 133 days on the average. They say that today, it is up to 300 days.

There is not a lot of support for S. 55 on this side of the aisle, but there is a whale of a lot of support for doing something about that problem.

I put in a bill, S. 598, that you may have had a chance to look at, because we discussed it, which I think would deal at least in part with this problem. But I must say to the chairman and to you that in my State, a lot of people are waiting, in situations where there have been replacements, where the workers believe that an employer is taking a strike just to get rid of them, and it is taking up to 5 years to get a determination. One case up on the Iron Range took 5 years to get a determination on an unfair labor practice. To me, that in and of itself is unfair.

So regardless of what our views may be on the issues presented in S. 55, it seems to me we are of a unanimous opinion about the issue of delay, and I would hope that—and maybe you can speak to what needs to be done—but I would hope also that, Mr. Chairman, you will consider at some point—you've got a terribly busy schedule I was just looking at around the Health Security Act—but we are being challenged here by a man who could be doing a lot of other things with his life, taking on an enormous responsibility. And I just wonder if it wouldn't be a good idea for us to have a hearing or some other forum in which this whole issue of delay, the impact that it is having on the working people in our country, the impact that it is having on the bargaining relationship in States like mine, where we could get that issue out and deal with it in

an open fashion and see if there aren't ways that we can help the chairman and help the Board.

I just present that to you.

The CHAIRMAN. Let me say I'm sure you could probably talk about the problem of delay at the Board now, and you have, but it would probably be most worthwhile after you have been down there a short period of time to come up with the other members of the Board as well, and we'd be glad to hear what recommendations you have, how much can be done internally, and what could be done legislatively.

We have taken some action with respect to the FDA, for example, which Senator Hatch remembers very well, on developing user fees to try to expedite the considerations and decisionmaking of that agency, and we are looking forward to seeing whether that is going to work or make some kind of difference.

But in all of the regulatory agencies, there are delays that take place. In the FDA, delay is enormously costly to the companies seeking approval of new drugs they have developed, and it is costly to the consumers when the agency doesn't make decisions or judgments. I don't know what the best solution might be over at the NLRB, but I think it is an important issue, and we'll follow up and work with the Senator and other members of the committee to try to find some way that we can be helpful and responsive and get your recommendations.

Mr. GOULD. I would welcome that opportunity, Senator.

The CHAIRMAN. Senator Hatch.

Senator HATCH. Thank you, Mr. Chairman.

Mr. Gould, I appreciated you coming and visiting me the other day. I have no doubt that you are a very bright and a very fine man, and I appreciated that time we had together.

I do have some questions. I am usually accused of performing the role of the skunk at the picnic, and some people think that is literally true, but I don't think it is.

Mr. GOULD. Well, Senator, I want to say I appreciated the opportunity to meet with you as well. I thought it was a good exchange, and I look forward to a future good relationship.

Senator HATCH. Well, I do, too. Let me ask you some questions, though, that I think need to be on the record, and I am asking them so that we can make a record here today. Senator Kennedy loves this period of time on the committee. [Laughter.]

The CHAIRMAN. We have a similar situation with Senator Simpson on the Judiciary Committee, so I do look forward to it, Orrin. [Laughter.]

Senator HATCH. Keep in mind part of this is to refine our chairman, which is an exceptionally difficult job to do from time to time, but he refines me a lot, I will say.

Now, Mr. Gould, you have criticized the Taft-Hartley and Landrum-Griffin Acts as tilting the balance of power in labor relations in favor of management. You have also criticized the remedies of our Federal labor laws as inadequate. You are very provocative, very intelligent, and very interesting, just in this book which I have spent some time on.

One question that has to be asked is, as a matter of conscience, how can you promise to enforce the laws that, literally, you have

been so critical of; and will you do that, or will you take the position that you have the responsibility of remaking the laws from the NLRB's chair?

Mr. GOULD. Senator, I think that is a very important question, and I want to State to you unequivocally and emphatically that my view is that as chairman of the Board, I will operate within the confines of the law as it is written.

I have expressed myself principally on policy matters, principally with a view toward changing the law, which is the province of the Congress. But I believe that the role that I am undertaking now is most akin and comparable to my role as an impartial arbitrator and mediator and fact-finder in labor disputes in both the private and public sector, and particularly my role as an arbitrator of grievance disputes where I am given carefully established parameters by the parties. Similarly here, I have them from you.

Senator HATCH. I think if you fulfill that role that way, most people will be very pleased with your service on the Board.

There are a number of areas of labor law that I would really like to explore with you this morning, and I think they are important, or I would not take this time.

Foremost among these is the issue, as I stated in my opening statement, which I did not give—but I'd like to ask that it be put in the record—

The CHAIRMAN. It will be made a part of the record and that of Senator Thurmond also.

[The prepared statements of Senators Hatch and Thurmond follow:]

#### PREPARED STATEMENT OF SENATOR HATCH

Mr. Chairman, I intend to oppose the nomination of William Gould as chairman of the National Labor Relations Board this morning. I do so reluctantly, because I believe Professor Gould to be a fine man and a distinguished scholar.

This nominee, however, has a troubling record. While this record includes 30 years worth of what many would consider controversial writings, one really need not look back more than 3 months, to the release of a book by William Gould titled "Agenda for Reform."

The book is truly what its title suggests: It is an agenda for reforming labor relations and labor law in this country.

The ranking minority member has effectively made out the case.

Supporters of this nominee have argued that Professor Gould's advocacy of radical changes in this Nation's labor laws should not weigh against him because this position will give him authority to apply and interpret, but not rewrite, the law.

This argument, however, should not carry the day.

Having reviewed Professor Gould's writings, I am persuaded, and in agreement with Senator Kassebaum, that such strongly held views must unavoidably inform and shape the decisions of one who serves in this quasi-judicial position. This is of particular significance in labor law, where the National Labor Relations Act leaves so much room for interpretation to the members of the Board.

Furthermore, it is fairly clear that in certain fundamental areas of the law in which Professor Gould has strongly held views, his views will, in fact, lead to the overturning of many case precedents.

I would hardly expect to be in complete agreement with this administration's nominee to this or any other position. What is indeed troubling to me, however, is that the areas in which it is most clear that Professor Gould will change current caselaw are those involving fundamental protections of the rights of individual employees; the right of employees to choose or not choose a union as their bargaining representative, and the right of employees to engage, but also to refrain from engaging in, union activities.

Professor Gould has suggested a balance between the rights of individual employees and the need for union solidarity. His critique of current law strongly suggests to me that he is prepared to tip that balance much too strongly toward union solidarity and against individual rights.

In conclusion, Mr. Chairman, let me say that I have carefully considered the arguments in favor of this nominee, including his record as an arbitrator. Those arguments, however, are not sufficient to mute the strong views expressed by this nominee on major issues in labor law which I believe he will be in a position to significantly influence if confirmed as chairman of the Board.

#### PREPARED STATEMENT OF SENATOR THURMOND

Mr. Chairman, it is a pleasure to be here this morning to welcome William B. Gould, the President's nominee for chairman of the National Labor Relations Board.

As you know, the National Labor Relations Board is an independent agency consisting of five members who act primarily as an adjudicatory body to prevent and remedy unfair labor practices committed by employers and unions. It is also responsible for conducting secret ballot elections of employees to determine whether or not they want to be represented by a labor union.

Mr. Chairman, throughout Mr. Gould's career he has been involved in labor relations. He began his legal career with the United Auto Workers Union. He then became an attorney for the National Labor Relations Board in Washington. From 1965 to 1968, Mr. Gould practiced labor law with the New York firm of Battle, Fowler, Stokes and Kheel. In 1968, he became a professor of law at Wayne State Law School in Detroit, MI. Since 1972, Professor Gould has been a professor of law at Stanford University.

Mr. Gould has written extensively on perceived problems with our current labor relations system and has suggested many reforms. According to the Washington Post, Professor Gould is "an outspoken advocate of workers' rights", and "has written extensively in favor of employee rights in the workplace". Professor Gould recently authored a book, *Agenda for Reform*, that outlines his views and visions for labor relations in America.

Mr. Chairman, I would again like to welcome Mr. Gould here today.

Mr. Gould, I look forward to reviewing your testimony.

Senator HATCH. In that statement, I mentioned some of my concerns about individual rights and freedoms, especially rights of individual employees, under the National Labor Relations Act. The two specific aspects of the law where this arises in your writing are, I would say, first, your disagreement with the U.S. Supreme Court's decision in *Patternmakers v. NLRB*, and second,

your apparent disagreement with current law regarding nonmajority bargaining orders.

Let me turn first to the Patternmakers case, in which the U.S. Supreme Court deferred to the NLRB's decision that the union's levying of fines against members who, in violation of the union's constitution, resigned during a strike and returned to work constituted an unfair labor practice.

You voiced strong disagreement with that decision—and by the way, understand that I know there is a difference between being a college professor and a law professor and being a judge or a chairman of the National Labor Relations Board, and I expect law professors to be provocative, I expect them to be controversial, I expect them to raise controversial issues, I expect them to jab students and make them think, and practitioners as well—so please understand that I am not finding any fault with your ability to be able to do that, and you have an exceptional ability to be able to get people to think in this area.

But you voiced strong disagreement with that decision, arguing that the Court did not “take into account the union's solidaristic interest in utilizing the strike weapon.”

Now, that view does trouble me, because section 7 of the Act not only grants the employees the right to organize, but it explicitly grants them the right to “refrain from any or all concerted activities.”

Now, that right includes the right to refuse to support a strike as well, in my opinion. And in Patternmakers, the Court held that the union policy regarding fines restrains and coerces employees and is inconsistent with the congressional policy of voluntary unionism.

Your criticism of this case indicates that you might well tip the scale against voluntary unionism in favor of union solidarity. If that is the case, it is a matter of great concern to me. You say that union members should have the right to walk out on the union under a statute that protects the right to refrain from union activity, but only at the appropriate time and appropriate circumstances.

Let me just put this in the form of a question. What factors would make union solidarity more valuable than employee freedom to choose? And would an inappropriate time always be when the union is engaged in concerted activity?

Mr. GOULD. Senator, this is an area where there are competing interests, as I think your statement has noted, the right to engage in concerted activities and the right to refrain from concerted activities. And I would say to you, Senator, that my view is probably most compatible with that of President Nixon's first Chief Justice Warren Burger, who said in the Granite State case in December of 1972, “Unions have need for solidarity, and at no time is that need more pressing than under the stress of economic conflict, while at the same time,” Burger continued, “the Act gives special protection to the associational rights of individuals in a variety of contexts.”

So that is my basic approach to this matter, Senator, that you have two very carefully balanced, competing interests. My view as expressed in that piece in essence was first that workers ought to be able to opt out when they have some sense of what the drift of



union policy will be at the time that a new collective bargaining agreement is negotiated so that they can disassociate themselves and put themselves beyond disciplinary sanction, and second, that unions should be obliged to conduct strike ballots both at the time of the strike and after a period of time subsequent to the strike, so as to give individual employees the right, through majority rule, to dissuade the union from taking the course of action that they are taking, even though they have not exercised their right to opt out at an earlier point.

Senator HATCH. But are you saying that at that point, if they strike, then the union members should not have a right to opt out?

Mr. GOULD. No, Senator. What I am saying is that in that circumstance, majority rule, which is a very important value contained in the statute, should govern, and that if the workers are in the midst of economic conflict when, as Chief Justice Burger said, the union's concern with its ability to discipline is at its zenith, then at that point, individual employees should be able to initiate a ballot through which, if they are successful, the union must discontinue that particular strike.

Senator HATCH. But if they are not, they cannot exercise their right.

Mr. GOULD. Not at that particular point. But under my proposal, most collective bargaining agreements run for a 3-year period, and you've got that entire 3-year period right up to the time that you are actually in the negotiation process during which you can opt out. That's the right to refrain. And you still have the right to refrain through majority rule subsequently. That was my view, Senator.

Senator HATCH. Is that only with majority rule, then, that they can opt out?

Mr. GOULD. No. Any individual may opt out at any point after they know what the union's drift—what their policy is going to be, until negotiations reach the crunch time, until the eve of the expiration of the collective bargaining agreement.

Senator HATCH. But once that eve occurs—

Mr. GOULD. And any individual can do that, Senator.

Senator HATCH. But once the eve occurs, then it would take majority rule for them to opt out.

Mr. GOULD. That's correct, that's correct.

Senator HATCH. Under your point of view.

Mr. GOULD. In my point of view. Now, I realize that that is not totally satisfactory—

Senator HATCH. That's not current law.

Mr. GOULD. It's not the current law, and Senator, four Justices would have said that unions could impose greater restrictions than that. Five justices said that there would be no restrictions.

Senator HATCH. I understand.

Mr. GOULD. My view is that, in light of the competing interests, there ought to be some kind of intermediate position.

Senator HATCH. Well, what if the strike goes on for months and months; would they have a right to opt out then? Would there be a period where the workers, worried about their jobs, worried about their livings, just worried about even continuing the strike, but yet they are in a minority status—if it were put to a majority vote,

would they have any right to opt out and exercise their individual right to opt out, or would they be bound by your interpretation to stay with the union position, regardless of how reasonable or unreasonable it may be—but let's say unreasonable in this case.

Mr. GOULD. Well, again, they would be in a position to know the reasonableness of the union's position before they made a decision, and they would be able to opt out individually at that juncture. But once the strike commences, once the economic conflict commences, as Chief Justice Burger said, this is the time that the right to engage in concerted activity is at its zenith, in his special opinion in *Granite State*.

In essence, my approach to this—and I confess to you, Senator, that it may not be a perfect one; there may be others who have better ideas—is to try to reflect Chief Justice Burger's concern.

Of course, the law now, the Patternmakers decision, has held that there is a right to resign at any time.

Senator HATCH. And I presume you'll uphold that law as a member of the Board.

Mr. GOULD. Under the current authority, under the case law as it has evolved, I would uphold that law.

Senator HATCH. That's all I need to know.

As you know, under the current law the NLRB may issue an order requiring an employee to bargain with the union—

Mr. GOULD. Senator, if I may just interject a second, though.

Senator HATCH. Sure, sure.

Mr. GOULD. Perhaps my last answer was not as complete as it should have been.

Senator HATCH. OK.

Mr. GOULD. The Patternmakers decision was based upon—particularly in Justice White's view; he cast the deciding vote—the Board's exercise of its expertise. The Court was deferring to the Board's expertise there.

Senator HATCH. OK. Under current law, the NLRB may issue an order requiring an employee to bargain with the union in the absence of a secret ballot election only a remedy for "outrageous" and "pervasive" unfair labor practices, which in fact prevent a fair election, and only if it is shown that the union at the time had majority status. I think I have stated that correctly. Now, I am, of course, referring to the case of *Conair Corporation v. NLRB*, which was a 1983 opinion written by DC. Circuit Judges, now Justices, Scalia and Ginsburg. I apologize for not being here at the beginning, but I was at her swearing in this morning and felt I needed to go there. There, the Court confronted the issue of whether the Board had the authority to issue a bargaining order and impose a bargaining representative on employees where the union had never—never—secured the support of a majority of the affected employees. To use a quote here, "The issue is vexing," the Court said, "because it trenches upon employee freedom of choice, a matter at the very center of our National Labor Relations Party."

The court said further, "To discourage employer lawlessness, arguably, the NLRB should be positioned to choose for employees when the prospect of an untainted election, held within a reasonable time frame, appears remote. We recognize the appeal of the position that a nonmajority bargaining order may be the only po-

tentially effective means to check an employer's unlawful conduct designed to nip a union's organizing campaign in the bud. Nonetheless we believe that the statutory gap we face is too deep for an agency or court to fill. A fundamental policy choice is at stake."

Now, is it ever appropriate to substitute an agency's even good "big brother" judgment for a majority of employees' express choice of a bargaining representative? This is what they say: "The basic decision we believe should be left to Congress as the organ of Government accountable to the people for establishing the main lines for national labor relations policy."

As I read your writings, they seem to indicate that you disagree with that opinion in two respects—first, that your in view as a matter of policy, nonmajority bargaining orders are warranted under certain circumstances, and second, that in your view, they can be properly obtained under the Act as it is presently written. Am I correct in stating that, or did I misstate it?

Mr. GOULD. Senator, the U.S. Supreme Court, in *NLRB v. Gissel*, explicitly reserved this issue that you are addressing, the so-called nonmajority bargaining order issues which arise from extreme, outrageous employer unfair labor practices, as an open one. Under *Gissel*, the matter is open.

Now, the circuit courts, as you have pointed out, are divided on this issue. You have referred to *Conair*; there are three circuits going the other way. Judge Higgenbotham in 1979 wrote a very important opinion to the contrary, and two other circuits are in accord with Judge Higgenbotham's opinion.

This is a difficult issue, like the one that you alluded to just a few minutes ago, the question of competing interests, because here again you have very carefully balanced competing interests. You have on the one hand the need to preserve the concept of majority rule, and you have on the other hand the attempt to avoid a situation where employers will profit from their egregious wrongdoing under the statute. And of course, the view of the three circuits that have gone contrary to *Conair* has been that one can never be certain with regard to fashioning a number of remedies what the outcome would have been if the illegal conduct had never occurred, but that it is an important goal of the statute to remedy particularly egregious conduct and that bargaining orders are important in this context.

I would say that, Senator, if this matter should come before me as chairman of the Board, I would hear all relevant evidence, as I do as an arbitrator, listen to all arguments made by the parties. I should point out that the matter cannot come before me as chairman unless the general counsel makes a determination to issue a complaint on this theory. And as you know, Board law as it currently exists is in accord with *Conair*.

Senator HATCH. I take it you feel that the Board could resolve that inter-circuit conflict rather than the courts?

Mr. GOULD. The Board, if the general counsel issues a complaint—

Senator HATCH. The general counsel issues the complaint.

Mr. GOULD. The Board could, if it so wished, consider the matter anew. Now, I have stated elsewhere, and I should state to you here on the record, that I believe that there is a presumption in favor

of stability. As you know, there have been shifts in doctrines by previous boards, both boards appointed by Democratic as well as by Republican Presidents. I believe in a presumption in favor of stability, and should the Board reverse what it has done previously, it should have substantial reasons for doing so.

Senator HATCH. That's fair. In your writings, you have advocated many changes in labor law, such as striker replacement legislation. You have also expressed some disagreement with the adequacy of back pay remedies under the NLRA. One area about which I have considerable concern, however, is labor violence. Do you think that the remedies under the NLRA are adequate in that area, and if not, what changes would your view count as warranted?

Mr. GOULD. Well, Senator, of course, under the Taft-Hartley Amendments, union violence became an unfair labor practice, but the remedies here are limited as well.

I have not formulated a proposal in this area because as you know, the doctrine of preemption, which ousts the States in most instances from regulation, does not apply here, and the States are free to regulate violence in the criminal courts and in the courts of general jurisdiction as they wish to do.

Senator HATCH. But as you and I both know, some of the States that are heavily unionized politically just cannot do that, so we have the violence continue. I just look at the recent case of this young man who had nothing to do with the coal strike, but went on the premises to clean out a pond, that he did on an annual basis, and started to drive out, and they started throwing rocks at his car, so all of a sudden he pulled into the pit, and they thought he was just pulling away from the rock-throwing, and they found he had been shot to death.

In some of these States, the States are incapable of taking care of some of the violence, because just politically, the politicians do not have the guts to do it. What do we do about those problems?

Mr. GOULD. I have not formulated a proposal for doing something about those problems, Senator. I am very concerned about union violence where it does occur. This goes back to the time that I was on the UAW legal staff. Senator Robert Kennedy's committee, when he was counsel to the Government Operations Committee, looked at the issue of violence in the Kohler strike in Wisconsin, which was still going on in the courts when I was on the UAW legal staff, and when I first went out there and got involved in some of the back pay proceedings that arose from that. I expressed my view when I was on the union legal staff, and I have expressed my view subsequently, that I abhor union violence; I would like to see it eliminated and diminished in the strongest possible way. But I have not formulated a proposal in this area.

Senator HATCH. One thing I would like to do is discuss it with you, because it sometimes becomes a very partisan issue. Some conservatives want to stick it to the unions because they don't like the violence, and they want a Federal law to do it. Generally, the liberals around here always want Federal laws on everything except in this case, because they are on the side of the unions. And nothing gets solved with regard to the union violence that really, real union people don't want; honest union people don't want union violence, and neither, of course, does the other side.

We have got to come up with some reasonable way of resolving that, and I'm not sure the Board can do that. But I really respect your intelligence and your background and your writings—I may not agree with you, but I respect you as a very intelligent and articulate person, and I'd like you to think about that a little bit more, because it's a big problem, and it is going to get worse.

Mr. GOULD. Yes, Senator, I share your concern, and I would like to talk with you about it further.

Senator HATCH. I appreciate your willingness to do so.

You contend that bargaining should occur over anything within, to use your words, "an attenuated impact on employment." Doesn't virtually every management decision really ultimately have a potential impact on employment? So where would you draw the line? Wouldn't management essentially have to bargain on every decision if we took your words and the thrust of your argument literally—every decision—new product lines, choice of advertising agency, market development strategies, if we took your language to the extreme?

And in light of the U.S. Supreme Court decision in First National Maintenance, that involved the right of unions to bargain over management decisions, how far do you think the Board could go absent a change in the statute toward your "attenuated impact on employment" standard?

Mr. GOULD. Senator, the case you are referring to, of course, is the First National Maintenance decision, which is the law which the Board is obliged to follow. No issue of administrative expertise is involved. I would say to you, Senator, that I will as chairman employ an approach to First National Maintenance of the kind that I have employed as an arbitrator, as someone who will apply this decision and who will listen to all evidence relating to the applicability of this decision to other situations, and I will listen to all arguments presented.

I will operate within the parameters that the U.S. Supreme Court has established in First National Maintenance unless you here come up with different parameters for us.

Senator HATCH. Well, I appreciate that. I think that is a good response.

Now, you claim at page 171 of your Agenda for Reform—which I think is a very interesting book—that First National Maintenance "unsatisfactory handling of job security issues necessitated the enactment of Federal plant closing legislation," the WARN statute, "yet the Congress specifically rejected tying a bargaining obligation to the WARN notice requirement in the 1985 Bartlett Amendment"—he was one of the leaders in the House at that time, now mayor of Dallas. How, then, did First National Maintenance necessitate the enactment of WARN?

Mr. GOULD. Well, the result of First National Maintenance, Senator, is that in closures or partial closures, there is no obligation to do anything unless the collective bargaining agreement provides to the contrary. And WARN stepped into a kind of vacuum in trying to provide something for workers under those circumstances.

Senator HATCH. Well, OK.

The CHAIRMAN. I just noticed Senator Wellstone here—

Senator HATCH. I just noticed him, too.

Senator WELLSTONE. I thank my colleagues for noticing me.

The CHAIRMAN. I wanted to give him an opportunity to question and then come back to you, Senator.

Senator HATCH. Sure. Why don't we do that?

The CHAIRMAN. I am always interested in listening to my friend and colleague from Utah, and I am particularly interested to hear him talking in this case about violence. You know, we hear a lot of objections to flooding our Federal courts with additional cases when they are in such difficulty at the present time, and about the courts being overloaded with a lot of Federal laws. It is interesting that some members of this committee are so interested in dealing with labor violence through Federal statutes, yet are unwilling to use Federal law to deal with access to clinics, for example, where we have had a murder in Florida—

Senator HATCH. Well, I don't happen to be one of them.

The CHAIRMAN. And not just the murder in Florida, but continued nationally coordinated campaigns to deny people access to their constitutional rights. So I think you are wise, Mr. Gould, to indicate you are going to think through this issue.

Senator HATCH. If I could just make one comment, I share the Senator's feelings on that. I don't think there is ever justification for violence, whether it is on the picket lines—as a person who has always upheld the right to strike and the right to picket in accordance with the law, I decry that violence. But I also decry the violence that has occurred at these abortion clinics as well. We share different points of view on how you resolve that problem, but I would certainly not countenance that in any way, shape or form.

The CHAIRMAN. I was also interested to hear your discussion with Senator Hatch of Judge Ginsburg's ruling on non-majority bargaining orders in the Conair case. Some might say that we should not have promoted her to the U.S. Supreme Court since she has an opinion and has written an opinion on this issue that is likely to come before the Supreme Court at some point. So if we are going to apply that standard, those who were disadvantaged in that case could argue that, well, since she's got an opinion, she will not be able to make an objective judgment on that issue when it comes before the U.S. Supreme Court. I think if you review the record of her confirmation hearings, Judge Ginsburg was questioned about that issue, but those who might have been concerned about the outcome in that case were still supportive of her—I recall particularly the excellent dissent in the Conair case by Judge Pat Wald, who still supported Judge Ginsburg for the U.S. Supreme Court.

Senator HATCH. Well, as I recall, she only had three votes against her.

The CHAIRMAN. You'll have an opportunity to continue.

Senator Wellstone?

Senator WELLSTONE. I'll be brief. First of all, Mr. Chairman, I apologize for being late. I had a conflict that I could not get out of, and I apologize to Mr. Gould as well.

I actually don't have any questions. I had a chance to meet with Mr. Gould at some length. But I wanted to comment on some of the questions that Senator Hatch had put to Professor Gould and also to kind of build on the mood piece—I am going to get Senator

Hatch's attention in a moment—Senator Hatch, I'm going to try to build on the mood piece of your questioning and what you said to Mr. Gould, because I really appreciated it when you said we may not agree, but I really respect your credentials, and I respect your integrity.

I am going to go with the flow of that because, Mr. Chairman, it seems to me that, given an academic background, one of the things that most impresses me about Mr. Gould is that what we have here is the exact opposite of mediocrity. He is somebody who has been a cutting-edge thinker and has a lot of writing and has put a lot of ideas out there for the public, all of which are very important to the kind of dialogue and education of our Nation. And in many, many ways, I think the last thing we want to do is to hold that against someone. I think we need more people like that, agree or disagree with the substance of every argument that Mr. Gould has made.

I am very impressed—and my understanding, Mr. Chairman, is that you have already made reference to this—I am very impressed with Mr. Gould's public arbitration record. I think you get such strong recommendations from both management and labor. You see an even-handedness, and again, you see a kind of tough intellectual integrity to Mr. Gould's viewpoint.

So given the fact that I do think we need strong leadership, I think Mr. Gould will provide exactly the kind of leadership we need as chair of the NLRB. I appreciate much of what he has done by way of his academic work. I appreciate his really distinguished, long distinguished record, and therefore I think he is an excellent choice.

I guess my last point, Mr. Chairman, is that once again, as I followed the questioning of Senator Hatch, it does strike me that the fact that someone has really been out there with a lot of important intellectual work and a lot of important articles is I think very much in the positive.

I once talked to Senator Hatch when I first came here—and this is true; you were my teacher—and I won't use the name, but there was a particular nominee, and we had this discussion, and I didn't agree with some of the particular issues. And you said to me: "Listen, this President has decided to nominate this person, and you may not agree, but if you think that person has integrity, and if you think that person is really qualified, that ultimately is what should matter." I feel that is exactly what applies to Bill Gould.

Senator HATCH. Well, thank you. [Laughter.]

Senator WELLSTONE. I knew he would say thank you.

The CHAIRMAN. You do much better with kindness than I do, Paul.

Senator HATCH. He still voted against the person, though.

Senator WELLSTONE. No, no. Excuse me. [Laughter.]

Senator HATCH. I'm just kidding.

Senator WELLSTONE. It is particularly important today for the record to make it clear I voted for that person.

Senator HATCH. All right, all right. I had it mixed up with another one, I guess.

Senator WELLSTONE. No; there is no other one.

Senator HATCH. I get a kick out of Kennedy—I mean, my chairman—raising now Justice Ginsburg, because even though there were some who really did not want to see her go on the Court, there were only three who voted against her; and that was important.

But now let me just kind of turn that around. There was another very good person——

The CHAIRMAN. Here we go. [Laughter.]

Senator HATCH. A very good person, steeped in great intellectual activity, who wrote in a wide variety of ways differently from what he did when he finally went to the DC. Circuit Court of Appeals, and his name was Judge Robert Bork—and his were held against him.

Now, if I vote for you, it will be pretty clear that I am not holding your viewpoints against you. But my questions are pretty clear that I don't want you running wild at the NLRB, and if you do, first of all, I think it would hurt the administration, and second, it would hurt your very vast reputation; third, I think you would lose a lot of credibility with people like myself. And I think in the end, you would do the country a great deal of harm, because these are tough areas. And I didn't feel good having to fight against something like labor law reform in 1978 as a person who earned my journeyman's card and who worked for 10 years in the building construction trades unions and who owes a lot to the union movement; I didn't feel good fighting that, except it was such a lousy bill, in my view. It was some extreme thing that I felt like we had to fight, and I think history has vindicated that.

So I am very concerned, I have to say. I started at the beginning saying I like you very much, and I do. There is no question about it. I have no doubt you are a wonderful law school professor and a wonderful human being. I have no doubt about that at all. And I think we are going to be friends regardless of what happens here; and I am certainly going to be your friend. But I do want to ask these questions because these are important. They are important to you. One reason people like me ask these tough questions is so that we can get your responses, and then I'll be able to find out just where does he stand on these issues, because people come to me and ask where does he stand; I want to be able to say, well, I have asked him. And thus far, I think you are doing pretty good.

Mr. GOULD. Well, Senator, those who know me as an arbitrator and also as somebody who has represented management know that professionally as an arbitrator, I have done anything but "run wild."

Senator HATCH. Well, you made that point in my office, and I am glad to hear it personally.

Now, let me say with regard to the Mackay doctrine, you stated at a minimum that employers should have to prove that temporary employees are not sufficient to meet the employer's needs; that ought to be the minimum thing they ought to prove before they can exercise their rights under the Mackay doctrine.

Now, would that require overturning the Mackay case, or would the Board be able to establish your particular belief within the current law?



Mr. GOULD. I think I State very clearly in my book, Senator, that that is a legislative proposal. The Board can do nothing whatsoever about Mackay. That is the law.

Senator HATCH. Good enough, good enough. If that is true, would you press for a change in Board law?

Mr. GOULD. Would I press for a change in the Board law?

Senator HATCH. Press for a change that we change the law.

Mr. GOULD. Well, I think you are referring to a book in which I advocated change. But that is your job.

Senator HATCH. OK. Now, in your book, you raise difficulties with respect to the State of the law on refusal to bargain cases and go on to say that, "The fundamental problem with or without a duty to bargain in good faith is that the players are not required to enter into a collective bargaining agreement."

Now, Professor Gould, I am interested in hearing from you how far you think the Board can go and should go under current law in evaluating specific bargaining proposals in connection with its determination as to whether bad faith bargaining has occurred. And also, do you think that under the Act as currently written, the Board has any authority to require the parties to enter into a contract or submit to third party interest arbitration?

Mr. GOULD. The answer to the second question is no.

The answer to the first question is that the Board cannot—because the U.S. Supreme Court and priority authority have instructed it not to—evaluate substantive proposals and to make findings of violations based upon those substantive proposals.

Senator HATCH. OK. Now let me change the subject. Do you think that employers who resist union economic demands for whatever reasons should have to open their books to disclose the basis for that position? And let me help you a little bit here. You State in your book at page 175 that the Board can compel disclosure of this information without any statutory amendments.

Is that your current view, and will you compel such disclosures if confirmed by the Senate? I could give you the quote—

Mr. GOULD. Senator, I am familiar with your reference. Let me say that here, I think I am in accord with your former staffer, Jim Stephens, who is now chairman of the National Labor Relations—

Senator HATCH. Now, that was a dirty thing to do to me. [Laughter.] Go ahead.

Mr. GOULD. Well, he has expressed himself on this subject, Senator, in an opinion, and he has taken a position that is remarkably similar, I think identical, to mine; that is to say, that employer claims which are susceptible to economic verification should be verified. And I believe, just as Jim Stephens believes, that that approach is compatible—

Senator HATCH. Is it limited to the economic verification area?

Mr. GOULD. It is limited to the economic verification area, yes.

Senator HATCH. OK. You have said that the managerial exemption should only apply to those involved in labor relations policies. Does this mean that outside the personnel and human resources departments, no employees could be considered managerial?

Mr. GOULD. That I think is—I have been unfamiliar with—I'd have to take a look at my book on that. But I certainly have said

nothing about interpretation of the law. I have not suggested the Board can change Yeshiva or Bell Aerospace if that's your question, Senator.

Senator HATCH. Well, what I am trying to get is your current viewpoint as you are now about to become chairman of the Board. I am glad to see you leave the positions in the book if you can in a number of areas. [Laughter.]

Mr. GOULD. Well, Senator, on the issue of managerial employees, Bell Aerospace and Yeshiva are the law. Now, I have criticized those opinions in the book, and I think you are perhaps referring to portions of that.

Secretary of Labor Brock referred to Yeshiva as a "dumb decision." I did not say anything like that about it. I disagree with it, but it is the law.

Senator HATCH. You were more effective in your criticism, I thought.

Mr. GOULD. But I have to live with Yeshiva, and I intend to live with Yeshiva and apply Yeshiva and Bell Aerospace.

Senator HATCH. Well, it means a lot to me to hear you say this, because it is important that you live with the current law and live with the current interpretation of the law by the Court. So that is important.

In Agenda for Reform, you State as follows: "Where 20 to 30 percent of workers, for instance, have expressed interest in collective bargaining, either through an authorization card or an election, it seems perfectly appropriate to compel some form of relationship between the employer and the union for those employees if they are not already covered by collective bargaining machinery. Collective bargaining should be mandated as it is in Japan, for instance, where a minority of workers in a firm seek collective bargaining."

Isn't it possible under the scenario that you outline there that an employer with 30 data entry operators would have to bargain with maybe as many as five different unions to determine their wages and conditions of employment; and wouldn't it be possible for two data entry operators who sit right next to each other to have different terms and conditions of employment under those circumstances? And if that is correct, what impact do you think that would have on the morale, productivity and efficiency of that particular company?

Mr. GOULD. Let me say a number of things there, Senator. One is that, of course, as you know, that is not my view of the law as it is presently written; that is a proposal for change.

As chairman of the Board, I will interpret the law as presently written on the basis of the evidence presented to me and the arguments made to me; and those proposals, of course, have nothing to do with my role as chairman unless you—

Senator HATCH. Unless we change the law.

Mr. GOULD. Unless you change the law.

Senator HATCH. So you are saying there won't be a 30 percent rule coming from the Board on the Board's own action?

Mr. GOULD. There most certainly will not.

Senator HATCH. OK. This is good, and I am sorry to keep my colleague from Massachusetts here; I know he always has even more

important business, but let me just finish with a few more questions, because these are important questions.

Mr. GOULD. Yes.

Senator HATCH. In 1984, you testified before the House Subcommittee on Labor-Management Relations that "The American labor law approach to the recognition issue is fundamentally flawed inasmuch as it proceeds upon the assumption that a political process environment for the resolution of recognition issues can adequately test employee free choice in the industrial context in a manner similar to political elections."

Professor Gould, why and how is an individual's free choice regarding who will best represent his or her own interests different in the industrial context than in the context of democratic government?

Mr. GOULD. Again, Senator, this idea, I think, was put forward with regard to legislative reform proposals. I will interpret the law as it is written. I will not rely upon theories such as those that I have espoused with regard to legislative reform.

Senator HATCH. OK. Let me ask it in a different way. You have written in favor of substantial revisions of the NLRB's election decisions, and not only election decisions, but their rules and their procedures as well. What are the values, if any, in a secret ballot election in cases where a union is seeking recognition?

Mr. GOULD. Well, I think a secret ballot box is very important, Senator. It is under the statute the preferred method to resolve representation disputes. It is the method to resolve representation matters in the overwhelming number of cases. That is the law as it is, and quite frankly, in terms of my proposals to change the law, that remains my assumption there as well, that the secret ballot box election is the preferred method. And I would like to see the ballot box become more inclusive. I would like to find ways in which more workers can use the secret ballot box election.

Senator HATCH. Well, are those values different in decertification as well as deauthorization elections?

Mr. GOULD. I would want to see the ballot box be as inclusive there as well as in connection with certification elections, Senator.

Senator HATCH. Are there any factors that might outweigh the value of secret ballot elections?

Mr. GOULD. Well, the only factor under the law is the Gissel decision which says in essence that an employer may not be rewarded for its unfair labor practice conduct in certain circumstances, and that where that unfair labor practice conduct interferes sufficiently with the prospects of a valid choice being made through the secret ballot box, then other methods for recognition will be used.

Senator HATCH. You have observed that, "Regrettably in the United States, the concept of economic democracy has lagged considerably behind political democracy." In your view, is economic democracy to be enhanced or impaired by eliminating the secret ballot union representation elections in any way?

Mr. GOULD. Oh, I don't want to see the secret ballot box elections eliminated in any way whatsoever, Senator.

Senator HATCH. I am glad to hear that. I was concerned about that, because sometimes you can read things differently.

Let me just ask a few more questions. In your recent book, the same book, *Agenda for Reform*, you observe: "The fact is that employers have been able to convince workers not to join union workers by providing them with benefits comparable in most respects, and sometimes superior to them, to those contained in collective bargaining agreements negotiated by unions. Thus, except for job security and provision for impartial arbitration, a kind of benevolent paternalism has helped to succeed in making workers disinterested in unions. By providing benefits, payment of dues and initiation fees to the union would leave the new unorganized in an inferior economic position. This tactic has been a particular formidable employer technique."

Now, I would appreciate your explaining what you meant by that last sentence, because your reference to "tactics" and "employer techniques" seems to suggest some problem with the fact that employers are providing good wages and benefits in the absence of union representation.

I assume that you are not suggesting that companies not provide those, so that the unions would have an easier time organizing their workers.

Mr. GOULD. No, I am not suggesting that, Senator. Employers have devised a number of ways to keep unions out. The one that I described and that you have just referred to is one of them. There is nothing in my legislative proposals or my view about the statute that has any relationship to that, that would prohibit it or limit it in any way.

Senator HATCH. OK. In *Agenda for Reform* you write: "Of course, the law should remain hostile to employers' attempts to defeat unionism." Now, that doesn't refer to the nonunion companies that offer better deals for employees.

Mr. GOULD. No, it doesn't, Senator.

Senator HATCH. OK. I didn't think it did, but I just wanted to make sure that was on the record.

You have stated that the U.S. Supreme Court's *Granite State* decision, prohibiting a union from fining an employee who has resigned from the union "heavily tips the scale in favor of the individual worker's rights especially during a strike." Is it your view that the National Labor Relations Act was enacted primarily to protect the rights of the union over those of the individual, or do you take the opposite approach, or do you think it is some sort of hybrid—

Mr. GOULD. No, I don't take that approach or the opposite approach, Senator. My view is that the preamble to the statute commits those who interpret it to freedom of association concerns, where the statute speaks of collective bargaining as being a desirable public policy goal, and it protects the right of workers to engage in concerted activities and to refrain from concerted activities. All those goals are in the preamble. All of those goals concern the statute, and those who interpret it must take into account all of those goals.

Senator HATCH. OK. Now, you have written in favor of eliminating judicial review of NLRB decisions in representation cases. What factors justify, in your view, the elimination of judicial review in election cases?

Mr. GOULD. I think that I spoke there of the potential for litigating representation matters through the unfair labor practice process, which takes a substantial period of time. The question of what has happened is that employers can frequently drag out cases that come before the Board in the representation arena by engaging in time-consuming unfair labor practice litigation.

I think that some of the proposals, particularly rulemaking, that I advanced earlier are ways in which that tendency might be limited.

Senator HATCH. Does that same view pertain to unfair labor practice decisions as well, or even deauthorization and decertification decisions?

Mr. GOULD. No; I have not advocated the denial of judicial review, if that is your question, with regard to those.

Senator HATCH. OK. Well, let me just say this. I want to thank my dear friend and colleague Senator Kennedy for being patient with me here this morning, and above all, thank you.

By the way, I saw your sister this morning, Senator Kennedy, and Eunice told me to blister both of us because we didn't ask anything about persons with disabilities when Mrs. Clinton was up here the other day.

The CHAIRMAN. I've already heard about that. [Laughter.]

Senator HATCH. I figured he had, but I figured I should tell him twice. He is supposed to keep prodding us in that area—and occasionally, Senator Kennedy does fail, I'll tell you.

But let me just say this, Mr. Gould. I have really enjoyed chatting with you here this morning as I did in my office, and if I can, I would like to submit some more questions in writing just so we can button this down. I think in the end it may be very helpful to you. But I have enjoyed chatting with you, I enjoyed reading your book and reading other matters where you have written and spoken. You are clearly a very, very brilliant person, and I think you have been a great teacher. You have a lot of very, very good people who support you who are very good friends of mine as well. And I just want you to know that I am very impressed with you personally and look forward to further dialogue here, and if you'll answer those questions, I'd appreciate that, as soon as you can.

Mr. GOULD. Thank you, Senator. I will.

Senator HATCH. Thank you. Welcome to the Board. And I hope that as you get over there, you will be the great chairman that all of us hope we'll find at this time where we do have particularly grave and difficult problems in the country, and maybe you'll help bring us together rather than split us apart.

Mr. GOULD. Thank you, sir. I'll do my best.

Senator HATCH. Thank you.

The CHAIRMAN. I was just waiting to hear that last sentence, that you can support the nomination.

Senator HATCH. I deliberately withheld.

The CHAIRMAN. But we haven't given up, we haven't given up.

I must say all of us have been impressed by your knowledge and breadth of awareness of the law, the statute, the holdings of the Board and the courts in this area, and also the workings of the agency. I look forward to supporting your nomination.

We will keep the record open for a week, and Senator Kassebaum and others will submit questions. I'd like to see if we could have the questions from the other members by, let's say, close of business on Tuesday next week. But we will keep the record open for a week.

Thank you very much.

Mr. GOULD. Thank you, sir.

[Additional information submitted for the record follows:]

SENATOR NANCY LANDON KASSEBAUM'S  
QUESTIONS FOR PROFESSOR WILLIAM GOULD

**Note to Professor Gould:**

Senator Kassebaum understands that you testified during your confirmation hearing that you view your role as a Professor of law as distinct from the manner in which you would serve as Chairman of the NLRB, if confirmed by the Senate. You testified that many of the views expressed in your recent book, Agenda for Reform, do not reflect your potential agenda at the NLRB.

In answering Senator Kassebaum's questions, please do not simply reiterate this point. Instead, Senator Kassebaum is interested in determining your views on the issues set forth below, regardless of whether you believe you would be bound by either the NLRA or existing Supreme Court doctrine that would prevent you from changing existing doctrine.

1. Professor Gould, you have criticized the Taft-Hartley and Landrum-Griffin Acts as tilting the balance of power in labor relations in favor of management. You also have criticized the remedies our federal labor laws provide as inadequate.

As a matter of conscience, how can you promise to enforce laws that you feel are unfair or inadequate?

2. You state in your recent book that "... Board policy changes with each new administration...." Agenda for Reform, p. 22. This statement seems to concede the point that the Board has broad discretion to shape labor relations policy. The Supreme Court may establish a general standard that it applies to a particular fact situation, but due to the wide variety of fact situations that may occur, the Board can easily distinguish any given case from the Supreme Court's doctrine.

[Please reference your comment in your San Diego Law Review article, Vol. 24, page 57, where you state that "the obvious but frequently unpalatable truth [is] that federal labor law, framed as it is in broad ambiguous language addressing matters about which Congress has been unable to provide definitive policy judgments, is federal labor policy defined by the NLRB and ultimately by the Supreme Court." (emphasis added)]

Isn't it true that the Board has broad discretion to establish labor relations policy?

3. You have criticized the Reagan/Bush Board for its "genuflection to management prerogatives." Agenda at p. 21. You have also characterized it as the "principal villain" in discouraging collective bargaining. Testimony of William Gould, "Has Labor Law Failed," Oversight Hearings before Labor-Management Relations Subcommittee, June 21, 1984, p. 78, 82.

If confirmed, will you continue in the tradition of the Reagan/Bush Board or will you change the direction of the Board?

4a. You appear to disagree with the Supreme Court's 1938 MacKay decision that permitted employers to hire permanent replacements for striking workers. In your book, Agenda for Reform, on page 193, you state: "My judgment is that Congress should overrule MacKay altogether."

What is your position on an employer's right to hire permanent replacements? [I understand that you state in your book and repeated at the hearing that this is a matter that Congress must decide, but I am interested in your reasons why you think Congress should overrule MacKay].

b. If striker replacement legislation passes, won't that lead to more strikes (and won't more strikes be inconsistent with stable labor relations)? Also, what happens to employers who cannot attract temporary replacements? Won't striker replacement legislation assure that unions will win those strikes?

c. In your view, should permanent replacements be eliminated in all cases? What factors determine whether permanent replacements could be hired during an economic strike?

d. Assuming an economic strike, and employees' are willing to work for less than the union's demands, what justifies preventing the hiring of employees (on a permanent basis) willing to work for less than the unionized work force? What risks for the unionized employees should an economic strike entail, if any?

5. During the campaign, then candidate Clinton supported repeal of right to work laws. As the Administration's nominee to Chair the NLRB, do you also favor repealing Taft-Hartley's right to work provision? [Again, recognizing that ultimately this is an issue for Congress to decide].

6. Do you favor the use of authorization cards for unions to gain recognition? If you believe that such cards should only be used in connection with a requirement that prospective members indicate support for the union through payment of union dues, why did you fail to mention this additional requirement in your recent book, Agenda for Reform, p 177?

7a. Do you think that employers that resist union economic demands, for whatever reason, should have to open their books to disclose the basis for that position? You state in your book (p. 175) that the Board can compel disclosure of this information without any statutory amendments. Is that your current view and will you compel such disclosure if confirmed by the Senate?

b. You have indicated in your recent book, p. 175, that employers should be required to periodically disclose three or four times per year, without a demand, information that relates to employment conditions. In your view, should this same principle require trade unions to make comparable periodic disclosures to employers; union members; union members; or nonmembers for whom the union is the exclusive representative?

8. Do you favor double and triple backpay awards to remedy unfair labor practice violations? If so, do you believe this would encourage more employment litigation?

What criteria would govern a case warranting double or triple backpay damages? Would the same damages (and criteria) apply to labor organizations that wrongfully induce employers to discharge employees?

In addition, you note in your recent book that you oppose offsetting backpay awards with interim earnings in wrongful discharge cases. Why won't this provide a windfall for an employee who potentially could collect twice for the same violation? If so, doesn't this have the effect of making our federal labor laws punitive rather than remedial?

9a. Do you believe that employers should be compelled to bargain over plant closures and product design issues? Are there any issues, in your view, that are fundamental issues for management alone to decide?



b. If the distinction between mandatory and permissive subjects of bargaining were eliminated, as you appear to advocate on p. 178 of your book, would the following issues be subject to bargaining: a company executive's compensation? a union executive's compensation? provisions of the corporate charter? provisions in the union's constitution and by-laws? selection of union officers who sit at the bargaining table? union stewards who handle grievances? the amount of union dues? the amount of Beck representation fees? the amount of the union's strike fund?

c. Would you place any limit on the subject matter of bargaining under your view of labor law?

d. Do you believe that labor organizations should be equal partners with business owners in the conduct of the business? What impact would imposition of this equal partnership have upon the rights of stockholders and other business owners, boards of directors, and others having responsibility to business owners for the success of the enterprise?

10. In one of your law review articles, you term the Supreme Court's decision in Ellis regarding the right of employees to object to how their union dues were being utilized, as "otherworldly." See "The Burger Court and Labor Law," 24 San Diego Law Review, 61 (1987).

Do you support the right of employees to object to the use of their union dues for organizing purposes (e.g. at other locations)? For political purposes? Why do you call the Ellis decision "otherworldly?"

11. Do you think that there are situations where the NLRB should grant recognition to the union even when the union has not demonstrated majority support of the workers? To what situations would this apply?

I am sure that you are aware that the DC Circuit has taken the position that the NLRA does not support minority bargaining orders. See Conair. Do you believe that the NLRB has the authority to issue minority bargaining orders? Would it be your intention to issue such orders if confirmed by the Senate? Under what circumstances do employer unfair labor practices justify requiring the employees to have a bargaining agent that is not supported by a majority?

12. On p. 178 of Agenda for Reform, you appear to favor mandatory labor contract arbitration. What justifies imposing a contract upon parties when they have no intent to agree to its terms? Isn't "intent" the essence of contract law?

13. You have stated with regard to successorship policy that "the obligation to assume the old collective bargaining agreement should be imposed upon any purchaser as a condition of purchase." Agenda for Reform, p. 178. Would you impose this requirement when only the assets are purchased? Would you impose this requirement if the successor did not hire a majority of the predecessor's workforce? Would you impose this obligation where the successor has not hired a substantial and representative complement of employees in the new venture?

Would you impose this obligation if labor costs and work rules of the existing contract made the predecessor's venture unprofitable? What effect do you believe this policy would have on potential buyers interested in purchasing troubled companies?

14. Professor Gould, regarding civil rights, you state the following in Agenda for Reform, p. 256:

"My own sense is that Congress was correct in avoiding the quota or affirmative action issue. Clearly the political reality is that the matter cannot be addressed in a reasonable fashion through the majoritarian political process."

What did you mean when you said that affirmative action and quotas cannot be dealt with responsibly in Congress? Are there other issues that cannot be dealt with in Congress? What branch of government should deal with issues of race and civil rights if Congress abdicates its legislative role?

15. Do you favor expedited union representation elections? Do you believe that this can be done under existing Board authority, and if so, how quickly would you like to hold such elections?

16. In Agenda for Reform, you state:

"The Act should be amended so as to allow nonmajority organizations to represent employees and to be consulted and share information about employer decision making that affect employment conditions where 20 or 30 percent of the employees have petitioned the Board to this effect. Under such circumstances consultation and communication should be mandated." Agenda for Reform, p. 141.

What type of consultation with the employer do you believe should be mandated when 20% of the employees choose the union? Should bargaining be mandated? Should disclosure of information be mandated? If yes, then what type of information should be disclosed?

Doesn't this mean that unions win every organizing campaign because when 80% of employees reject the union, the union still acquires the right to represent the remaining 20% of employees? Does your endorsement of proportional trade union representation, which appears to apply when the union cannot achieve a majority, also apply when the union has more than a majority?

17. You state in your recent book:

"Legislation introduced by Senator Edward Kennedy in 1992 would amend the Occupational Safety and Health Act and mandate employee committees charged with responsibility in the health and safety area. If this legislation is enacted in the future, another institutional basis for representing worker interests relating to employment conditions independent of union majority rule would exist." Agenda for Reform, p. 260.

Do you believe that unions should represent workers through mandatory health and safety committees? Why do you think that unions need an additional role?

18. Do you favor labor management cooperation, and if so, do you favor amending the National Labor Relations Act to allow such cooperative efforts to continue?

You have written in favor of employee involvement and employee participation programs. How do you define such programs? Should these programs be allowed to function in nonunion employment and address employees' wages, hours, and working conditions? Should employee participation programs be allowed to function in unionized employment without the union's approval? Where employee participation programs exist in unionized employment, should nonunion employees be excluded from a participatory role?

19. In your book, you characterize Electromotion as a narrow decision. Why? In addition, you appear to state that the test for a labor law violation should be whether the employer's assistance was designed to thwart union organizing efforts. If that is the case, then why should the Board have found a violation in Electromotion when the NLRB specifically determined that the employer did not know about the organizing drive when it established the management-employee committees?

20. You referenced in your book and at your confirmation hearing that you support expanded use of the Board's rulemaking authority. In what areas do you support rulemaking? If one of those areas includes the issue of appropriate units for bargaining, please describe the industries that you would seek to cover and how you would decide which industries (and bargaining units within those industries) you would chose.

21. In your recent book, you express concern with the "decline of the labor movement." How do you define the "labor movement?" Are labor unions which are not affiliated with the AFL-CIO part of the "labor movement?" Are employee participation programs with no labor union affiliation part of the "labor movement?" Are employees who have no organized structure part of the "labor movement?"

22. Do you oppose the distinction drawn in Board and court decisions between employees and managers? Under your view, is there any level or function in the work force that business owners could exempt from trade union organizing? If so, what criteria would separate those employees exempt from trade union organizing and those subject to it?

23. In your book, you analogize "employment at-will" agreements to "yellow-dog" contracts. Do you also oppose union "membership," union "membership in good standing," and union "dues-equivalent" provisions?

24. What notice of employees' rights under the Pattern Makers and Beck decisions should be included in the "union security" provisions of labor agreements?

25. What criteria should govern nonmembers' payments under Beck? What remedies should be provided for Pattern Makers and Beck violations?

26a. Regarding property rights, do you favor providing nonemployee union organizers access to employers' premises to organize employees? What standard should govern whether such access should be mandated? In delineating a standard, would mandating such a requirement raise concerns regarding the employer's property rights? What factors would justify overriding the employer's property rights in favor of increasing

the union's ability to organize?

b. In addition, would employees be required to demonstrate an interest in the union before access were granted? If yes, then what would the appropriate showing of interest be?

c. You have written that the employer's property rights should be overridden in favor of nonemployee organizers in part because the NLRA does not mention property rights. In your view, should the NLRA always prevail when it is in conflict with preexisting law that the NLRA does not mention? How would you go about determining whether the outcome should favor the NLRA or preexisting law?

d. How would you go about determining whether the NLRA should prevail when it is in conflict with other Acts of Congress?

27. In your view, with respect to the construction industry, does the NLRA prohibit a contractor -- signatory to a collective bargaining agreement -- to own operate or have a financial interest in a separate open shop firm that competes in the same market? What if the same contractor operated in a separate and distinct market? Regardless of current law, do you have an opinion, as a matter of policy, whether contractors should be able to operate dual shops?

## ANSWERS TO SENATOR NANCY LONDON KASSEBAUM'S QUESTIONS

1. At the outset, I want to emphasize that, although I believe (and have written) that the National Labor Relations Act would benefit from a variety of legislative changes, I do not subscribe to the proposition that the general enforcement of the Act as it is written is "unfair." Rather, I believe that the neutral, balanced, and reasonable enforcement of this Act, in accordance with the rule of law, is, and has been, essential to the promotion of stable and constructive labor relations in this country.

I also want to emphasize that - although this Committee has thus far focused on suggestions I have made for adding certain regulations on employer conduct - my suggestions regarding changes in the labor laws include a variety of changes that would add to the legal restraints on unions - particularly in the area of economic pressure - and other changes that would reduce existing restraints on employers. See Agenda, Need for Balanced Regulation, pp. 53-55, which advocates balanced regulation of both sides where the conduct of each is unacceptable, and promotion of employer free speech in organizational campaigns, p. 157; "Taft-Hartley Comes to Great Britain: Observations on the Industrial Relations Act of 1971," 81 Yale Law Journal 1421 (1972); "On Labor Injunctions, Unions, and the Judges: The Boys Markets Case," 1970 Supreme Court Review 215; "On Labor Injunctions Pending Arbitration: Recasting Buffalo Forge," 30 Stanford L. Rev. 533 (1978); "Solidarity Forever - or Hardly Ever: Union Discipline, Taft Hartley and the Right of Union Members to Resign," 66 Cornell L. Rev. 74, 106-114 (1980); "The Status of Unauthorized and 'Wildcat' Strikes Under the National Labor Relations Act," 52 Cornell Law Quarterly 672 (1967).

I have also advocated regulation of "union abuses or excesses" in the internal union electoral process and have advocated mandated secret ballot box elections of union leaders by the rank and file. See, Agenda, pp. 176-77. Moreover, contrary to the views of many labor unions, I have advocated both statutory interpretations and legislative proposals providing for employee committees and various forms of employee representation in the non-union sector. See Agenda, pp. 136-149; "Japan's Reshaping of American Labor Law," pp. 95-99 (1984).

I have taken these positions because my overall purpose in suggesting legislative changes has not been to enhance union power; it has been to promote stable and constructive labor relations institutions that will respect all parties' legitimate rights and obligations (including those of individual workers), and enhance the productivity of the nation.

As you know, should the Senate confirm me, I shall be the first Chairman of the National Labor Relations Board since Professor Harry Mills, appointed by President Franklin Roosevelt in 1940, to possess a background as an impartial and neutral arbitrator and mediator of labor disputes. I believe that it is this experience which demonstrates that I will be able to faithfully enforce the existing Act, even where I would prefer legislative changes.

As I stated to the Committee on October 1, I will be fair in the role of Chairman of the Board because that role is analogous to my arbitral experience. In my arbitration cases, I have been frequently called upon to fashion opinions and awards which were based upon the dictates of the collective bargaining agreement to the parties, notwithstanding any policy views I might have to the contrary.

2. I do not believe that after almost 60 years of authoritative construction of the NLRA by the courts and prior Boards that the Board has "... broad discretion to shape labor relations policy," and I have not expressed this view. I do not agree with the conclusion that the Board can "easily distinguish any given case from the Supreme Court's doctrine." Congress fashions the national labor policy and the Board only has

authority to fill in gaps consistent with the policy established by Congress as interpreted by the Supreme Court. But it is the overall policy of Congress that the Board must at all times seek to implement.

I do not intend to follow any "tradition" favorable to one side or another. As I indicated at the hearing, I intend to pursue a balanced approach through which the Board can reach out to and obtain acceptance from both labor and management, so that, I would hope, all would believe that the agency was respectful of the legitimate interests of all sides and was faithful to the policies of the statute. As was the case with my record of more than a quarter of a century as an arbitrator, I shall act as an impartial neutral. Under the leadership of James Stephens, the Board has exhibited impartiality, neutrality, and principled decisionmaking. As Chairman, I intend to continue in that direction.

In this connection, my goals concerning my behavior as Chairman are well-reflected in the attached generous letter to the Committee from management labor lawyer George Preonas of the Seylarth, Shaw, Fairweather & Geraldson law firm in Los Angeles, who kindly furnished me with a copy of this document. Mr. Preonas notes that the Board is now confronted with a "crossroad" which was missed here in California in connection with the Agricultural Labor Relations Board. On my role as Chairman and on the problems of past Boards, Mr. Preonas stated the following to you on September 22:

Going back to the Carter Administration and continuing through the Republican years, there has been an abundance of split decisions and too many members with an agenda of revising the law rather than enforcing the law. Disregarding precedent, efforts were made to "reform" the Act and bypass the legislative process. The only way out of this quandary is to have the leadership of someone of Bill Gould's stature. He is not only one of the country's foremost experts in the area, but he has a practical understanding of real life issues through his years as an arbitrator. I am convinced he will have the good judgment to understand when the NLRB can and should intervene to stop and remedy improper behavior and when the NLRB should respect decisions made by parties to contracts rather than undercut the bargaining process. Most important, I believe he has a respect for precedent and that he can get the agency back on a steady course.

In the final analysis, the interests of the Board, of the parties who appear before the Board and of the country are best served by appointing a Chairman of unquestioned intellect, integrity, fairness and judgment. Bill Gould certainly fulfills all these requirements. He would make an excellent Chairman.

I am pleased that numerous other letters stating similar views have been received by the Committee from management labor lawyers throughout the United States.

4. I can provide no greater clarity on my views on striker replacements than is provided in Agenda, pp. 185-195; 198-203. However, my stated policy views in these respects will have no role to play in interpreting the National Labor Relations Act, should I be confirmed. These writings are suggestions for legislative changes, and they will have no influence on how the unchanged statute would be interpreted. Hard and fast answers to any of the more detailed questions that you ask regarding proper striker replacement policy are difficult and depend upon facts arising in particular

circumstances. Also, given my pending nomination, I believe it would be inappropriate for me to state answers to any specific policy questions that have not been the subject of careful study, thought, and writing on my part.

5. As your preface notes, this is an appropriate matter for Congress to decide. I do not deem it appropriate to express a view on hypothetical legislative proposals in the context of the confirmation process, especially when the proposals are on an important issue that has not been the subject of specific, prior scholarly study and writing on my part. However, as I noted on October 1 in response to questions from Senator Hatch and Senator Durenberger, should the Committee decide to solicit my views about this, or other legislative matters during my tenure on the Board, I shall be pleased to study these issues and prepare an evaluation of them to the best of my abilities, and to appear before the Committee at that time.

6. I did not fail to mention this in my book. Please note in my book, Agenda, page 162, where I advocate, as a matter of legislative policy, the practice in Canada. And please note pp. 217-218 where I describe the process in Canada. Again, the authoritative law under the NLRA relating to the use of authorization cards is that stated by the Supreme Court in Gissel, and I, as Chairman of the Board, will follow and adhere to the law as stated in Gissel.

7a. As I said to Senator Hatch on October 1, I have expressed agreement with the position of Chairman Stephens, i.e., that an employer should be required to verify its economic position where it is capable of economic verification. Neilsen Lithographing Co., 305 NLRB 697, 706-707 (Stephens dissenting). With regard to your second questions, I shall decide cases that come before the Board on the basis of the relevant facts, arguments and authorities.

7b. The discussion referred to is a reference to a legislative proposal, and is not in any way intended to assert a position regarding any possible NLRB interpretation of an employer's obligations under the unamended Act. My writings do, however, include recommendations regarding possible union disclosure duties as well as employer disclosure duties.

8. My views regarding possible legislative alterations in the Act's current remedial scheme are stated at Agenda, p. 165-166. I believe these pages answer most of your questions in this area. With regard to your question concerning the possibility of excessive litigation, experience indicates that as a general matter effective remedies ultimately discourage employment litigation because they encourage compliance with legal standards. I would also note that, as a general matter, I do believe that the issue of whether any given legal change will increase litigation is an important one, and that the law should generally seek to accomplish its ends in a fashion that will not needlessly increase the costs, delays, and inefficiencies of excessive litigation. Indeed, I discussed this issue in my Hearing Statement, when I emphasized my desire to promote the greater use of settlements of disputes that are before the Board.

9. I would once again note that, as Chairman of the Board, I am obliged to - and I intend to - adhere to the relevant Supreme Court authority. In the duty to bargain area, the relevant Supreme Court decisions are Borg Warner, Fibreboard, and First National Maintenance, and these decisions make unmistakably clear that under this Act there are "fundamental issues [which] management alone [may] decide." Those issues include a variety of plant closure issues and product design issues.

The many hypotheticals raised in your questions all present interesting and provocative issues. On most of them, I have not expressed a view and have not formulated a view. Of course, the elimination of the distinction between mandatory and permissive subjects of bargaining is not a policy judgment that is open to the Board, and any legislative modification of the current law would come to the Board in

the context of concrete legislation which would reflect legislatively determined standards in this area. Again, as I stated to Senator Hatch and Senator Durenberger on October 1, should this Committee and other relevant committees solicit my views as part of an inquiry into possible legislative change, I shall be pleased to examine any proposals that may be at issue and present my best analysis for the Committee's benefit.

With regard to your questions about equal partnership, my view is that this matter is best resolved by the parties themselves through voluntary collective bargaining. Illustrations of this are contained in Agenda, pp. 104-105; 123-131. Of course, under American labor law, the employer may unilaterally institute its own position subsequent to bargaining to impasse.

10. To understand my criticism of the Ellis decision's reasoning with respect to the treatment of organizing expenses under the Railway Labor Act, it is necessary to examine the paragraph prior to the one that you quote. It provides the basis for the conclusions that you note. I am quoting it here from "The Burger Court and Labor Law" at 61:

The proposition that expenditures for organizational activity are not germane to collective bargaining and therefore cannot be imposed upon those who would otherwise be free riders, an idea which received no explication whatsoever by Justice White in Ellis, totally ignores what all observers of labor-management relations have known since the beginning of organized relationships between the two: Unions must organize and recruit new members to protect the gains and standards of those in the bargaining unit. This is especially so when the organizational activities are taking place amongst employers which are direct competitors of the enterprise in which the dues are collected--although the truth of this proposition seems to me to be self-evident in other situations as well.

Although I believe that my criticism is valid, I would once again emphasize that, as Chairman of the NLRB I would have no authority to affect those Supreme Court decisions. With regard to the issue of how I would analyze related issues that might come before the Board, I would give full respect to Supreme Court authorities, including the Beck decision, which is the subject of ongoing NLRB proceedings in this area. Because of these ongoing NLRB proceedings, and because I have not engaged in specific scholarly study nor expressed a point of view about Beck and related issues in my writings, I believe it would be inappropriate to engage in any general discussions of these issues.

11. As I said to Senator Hatch on October 1, the Supreme Court has characterized the issue as an open one in Gissel. As I noted in my response to Senator Hatch, there are three circuits which hold a view which is contrary to that articulated by the Court of Appeals for the District of Columbia in Conair. I also stated - and I reiterate in response to your question - that should the General Counsel issue a complaint in this area, I would consider the case on the basis of all the relevant facts and law. As part of my inquiry in the case, I would fully study and consider the arguments and authority of the Conair decision, other court decisions, all relevant Board decisions, and any other arguments or authorities raised in the briefs by the parties to the case.

12. My reasoning regarding first contract arbitrations is provided in Agenda, particularly at pp. 167-170 and 222-230. Once again, however, I must emphasize that the current statute would not authorize any such Board-imposed arbitration process. My writings in this area are purely in the nature of legislative reform proposals and have no bearing on any issues regarding how the current Act might be interpreted.



13. With regard to many of the issues raised in your question, I have not expressed or formulated a view at present. I would not feel comfortable formulating and stating views on these complex and difficult issues without substantial study and reflection. Once again, however, if these issues should arise during my tenure as a Board member I would give full effect to all controlling authority under the current Act.

14. My view is that - depending on the specific issue - such matters can be handled by all branches of government, including Congress. I would note, however, that historically, the judiciary has played a leading role in fashioning rules relating to race and civil rights in connections with the Equal Protection Clause. This phenomenon has been most pronounced where important and divisive issues have not been dealt with by legislators. Of course, the most significant example of this is Brown v. Board of Education. The current law on affirmative action is a mix of rules enacted by Congress, often exercising its powers under the Fourteenth Amendment, and rules established by the Supreme Court.

15. As a matter of policy, I have advocated expedited union representation elections. As to the nature of existing Board authority, my views are expressed in Agenda, at pp. 158-62.

16. With regard to the first question, I have not expressed a point of view on this and I have not formulated one at present. With regard to the second question, see the quote which you have provided at page 141 of the Agenda. With regard to the third question, I have not expressed a point of view and have not formulated a position on this.

With regard to the second paragraph and the first question, my answer is no. What is advocated in Agenda is "members only" representation, something very different from the principles of exclusivity.

Again, my proposal does not relate to my role as Chairman of the National Labor Relations Board. As Chairman of the Board, I would be enforcing the existing law as written, which contains nothing relating to the proposal that I had made relating to representation rights set forth in this question.

As I state at page 165 of Agenda, this kind of system existed in the federal government prior to President Kennedy's 1962 Executive Order relating to federal employees. As you know, it has existed and does exist for many state and municipal employees throughout the United States.

The proposal does not involve exclusive bargaining rights for a union. As was the case with federal government employees prior to President Kennedy's 1962 Executive Order, unions would represent only their members.

With regard to the second paragraph and its second question, I do not advocate proportional trade union representation.

17. With regard to the first question, my belief is that issues relating to the health and safety of employees are vital to the concerns of both workers and employers, and where unions exclusive bargaining representatives they should be involved along the lines that Senator Kennedy's legislation advocates. A contrary view would be harmful to the system of exclusive bargaining representation, a basic process which is central to the National Labor Relations Act, which I am obliged to follow as Chairman and which I support as a matter of policy.

18. Yes, I do favor labor management cooperation. With regard to the other questions, see Agenda, pp. 139-147. The answers to the last two questions in this paragraph depend on a wide variety of factors which may play a role regarding the

proper application of section 8(a) (5) of the NLRA. As a general matter, however, a unionized employer may not ignore the obligation to bargain in good faith and in some circumstances this would be applicable in establishment of a participation program. At the same time, where a program allows broad employee participation within a bargaining unit, all employees, union and non-union, should be part of the employee participation program.

19. See Agenda, pp. 139-147. I would note, however, that many of the members of the Board who decided Electromation emphasized the narrowness of their decision. In the relevant pages noted above and elsewhere, I have put forth ideas about the way in which Electromation should be interpreted in this area as well as proposals for legislative reform.

20. With regard to all questions, these are matters which shall come before the Board and I shall consider them subsequent to confirmation, should the Senate confirm me. Any decisions reached by the Board in any rulemaking proceeding will be based on the arguments and evidence gathered from all parties in the public proceeding. My views, which are not yet formulated, will be based on the full record of such a proceeding.

21. I define the labor movement as representatives of employees who have banded together for various purposes. With regard to the second question, the answer is yes. With regard to the third question, the answer could be yes depending upon the form of the employee participation program. With regard to the fourth question, I have assumed in my writings that the labor movement involved some kind of organized structure. Therefore, the absence of some kind of structure would not be within the term "labor movement" as I have used that term.

22. As Chairman of the Board, I shall follow the law under both Bell Aerospace and Yeshiva. With regard to my ideas as to how the law should be changed in this regard, see in particular pp. 142-144 of the Agenda.

23. Insofar as this question may relate to the lawfulness of union security clauses under the National Labor Relations Act, it is not appropriate for me to comment, inasmuch as those issues may be presented in litigation before the Board.

24. This is a matter which may come before the Board and it is therefore not appropriate for me to express a position beyond my published writings.

25. See my answer to question 24.

26a. As Chairman of the Board, I shall follow the standards fashioned by the Supreme Court in Lechmere. With regard to the other questions set forth, see Agenda, pp. 157-158.

26b. Again, see Agenda, pp. 157-158.

26c. The question of accommodation between the National Labor Relations Act and other statutes or sources of law, is a difficult one which does not yield to an easy generalization. I am unable to answer the question with precision, except to note that the issue has been addressed by the United States Supreme Court and other courts on a number of occasions in the labor law arena with regard to the National Labor Relations Act, as well as other statutes. See, e.g., NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939); New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938); Southern Steamship Co. v. NLRB, 316 U.S. 31 (1942); Carey v. Westinghouse Electric Corp., 375 U.S. 261 (1964); NLRB v. Tanner Motor Livery Ltd., 394 F.2d 1 (9th Cir. 1965); Alexander v. Gardner-Denver Company, 415 U.S. 36 (1974); United States v. Hutchinson, 312 U.S. 219 (1940); United Mine Workers of America v. Pennington,

381 U.S. 657 (1965); Local 189 Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965); Connell Construction Co. v. The Plumbers Local 100, 421 U.S. 616 (1975).

26d. See answer provided to 26c.

27. These questions involve matters which may come before the Board and therefore it would not be appropriate for me to express a point of view. Once again, I would note that my written views have been the result of extensive scholarly study and reflection on my part. I have not written on this issue, nor have I engaged in similarly extensive scholarly study or reflection.

Additional Questions for Professor William Gould from Senator Orrin G. Hatch, October 5, 1993

- 1) What role do you think the Board can/should play in promoting labor-management cooperation?
- 2) You have stated that the Board has considerable latitude within the confines of current law to remove "roadblocks" to employee involvement programs and other cooperative labor-management relationships. In your view, what roadblocks currently exist? How can the Board, under your leadership, clear these roadblocks?
- 3) The Commission for the Future of Labor-Management Relations is expected to suggest a number of reforms to our nation's labor laws. What role do you expect to play when those suggestions are presented to the Secretary of Labor? Will you be an advocate for those changes that are also mentioned in your book?
- 4) In your testimony before the Committee, you advocated rulemaking as one way of reducing delay and expediting unfair labor practice litigation. In what other areas of the law do you advocate rulemaking by the Board? Why?
- 5) You stated in your testimony before the Committee that only 2 of the arbitration cases that you settled have been challenged by the parties involved, a very impressive record of achievement. What issues were raised in those 2 challenges? How were those issues eventually resolved?
- 6) As you know, under the Mackay doctrine, unfair labor practice strikers must be reinstated when a strike ends, but employers have the option of permanently replacing economic strikers. In your view, how does current case law distinguish between economic and ULP strikes?
- 7) You stated in your testimony before the Committee that despite your advocacy of labor law reform, you will enforce and interpret the law as it is presently written. To what extent will you rely on current Board precedent in doing so? Are there any areas (i.e. employee involvement, information disclosure) in which you are less likely to rely on Board precedent? Please explain.
- 8) You stated in your testimony that there is a presumption of stability in our nation's labor laws and that the Board should have "substantial reason" to reverse decisions such as Conair. What factors would you consider in determining whether "substantial reason" exists?
- 9) You have expressed dissatisfaction with the NLRB's holding in Otis Elevator (II) that employer decisions to transfer and consolidate operations are not mandatory subjects of bargaining unless the decision "turns on labor costs." Do you believe there is "substantial reason" to overturn or modify this decision? In your view, how much latitude would the Board have to do so?
- 10) In your testimony before the Committee, you stated that "the Board can do nothing whatsoever about Mackay." However, in your book, you advocate a rebuttable presumption that temporary employees are sufficient to meet the employer's needs. Please clarify your view.

Could the shift to "rebuttable presumption" be accomplished without a change in the statute? Why or why not?

- 11) You have stated that employer claims that can be economically verified should be verified. Would you oblige an employer to disclose financial information to a union if the employer claims that it is already paying wages higher than the prevailing rates of its competition in the same labor market? Please explain.
- 12) You have stated: "Whenever financial data is necessary for the union to verify the employer's economic position, whether it be in the form of productions, sales or profit figures, ought to be available to it and its representatives who possess expertise." In your view, does the Board have authority to compel such disclosure under the Act as written? Please explain.
- 13) In your testimony, you stated: "I would like to see the secret ballot box become more inclusive. I would like to find ways in which more workers can use the secret ballot box election." Does this mean that you intend to use your position as Chairman to make it easier for unions to request an election? Please explain.

#### ANSWERS TO ADDITIONAL QUESTIONS FROM SENATOR ORRIN G. HATCH

1. As I said in my statement of October 1, the Board can play a role by bringing labor and management together informally to discuss the functions of the Board and its procedures. I am uncertain about the precise form that this should take because of the potential relevance of various pieces of so-called "sunshine" legislation. As I have indicated, I intend to meet with the leaders of both labor and management, lawyers and non-lawyers, to discuss the ways in which the Board can function more effectively. As I have indicated, in this connection, I would follow the general approach which was used so successfully under the Chairmanship of Betty Murphy.

2. The roadblocks are Sections 2(5) and 8(a) (2) as interpreted. I believe that I cannot be more specific than I have been in my statement and in my writings because this would involve comment on cases that would come before the Board and this would not be appropriate.

3. As I indicated on October 1, my role as a decisionmaker is solely to interpret the law as written. As I indicated to you on October 1 in response to your questions about union violence, should the Committee - and indeed the relevant House Committee - solicit my views on labor law reform, I shall be pleased to present them.

I do not plan to play any role in connection with the proposals set forth by the Commission for the Future of Labor- Management Relations. I shall not be an advocate for the Commission in any way, shape, or form.

As I indicated to you in our meeting on September 29, I shall not meet with either labor or management in ad hoc strategy sessions about legislation, whether the legislation is proposed by the Dunlop Commission or not.

4. Please see my answer to Senator Kassebaum's question 20.

5. These cases are referred to in my article "Judicial Review of Labor Arbitration Awards," 64 Notre Dame L. Rev. 464 (1989) at 464. In Marine Transport Lines, I issued a cease and desist order against a union's violation of the no-strike provision in the collective bargaining agreement. At the time of my award, the United States Supreme Court had held in Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962) that the Norris-LaGuardia Act prohibited federal courts from issuing injunctions for a union's violation of a no-strike clause in a collective bargaining agreement. The question of whether an arbitrator was authorized to issue an enforceable award prohibiting a strike through a cease and desist order where there had been a violation of a no-strike clause was an open one. (Of course, there was no question about the lawfulness of the award in my case - simply its enforceability under the authority of Sinclair.) Although my award in this case was not enforced, my view about the

propriety of such an arbitrator's award was later followed by the Court of Appeals for the Fifth Circuit in New Orleans Steamship Association v. General Longshore Workers, 389 F.2d 369 (5th Cir. 1968). Subsequently, as you know, the United States Supreme Court reversed its position in Sinclair in Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970), a decision which I have supported in "Labor Injunctions, Unions and the Judges: The Boys Markets Case," 1970 Supreme Court Review 215. Accordingly, under Boys Markets - which was not the law at the time of my award - the award would have been enforced in light of the accommodation fashioned between the Norris-La Guardia Act and the National Labor Relations Act.

The second case is Brotherhood of Teamsters Local 65 v. S.E. Rykoff & Co. In this case, I held that a grievance filed by the union was not filed in a timely fashion. The court denied the union's motion for summary judgment to vacate the award because, in the court's view, my award was a "plausible" interpretation of the collective bargaining agreement. Said the court:

The Arbitrator performed his job, which includes not only listening to the arguments of the parties, but also interpreting the evidence. This court cannot say that the decision is an implausible interpretation of the collective bargaining agreement.

6. For my understanding of this issue, see A Primer on American Labor Law, 3d edition, pp. 97-98 and particularly cases cited in footnote 51 on p. 264.

7. It is difficult to state or define with precision the extent to which I would rely upon current Board precedent in any given areas of law. My statement, to which you have alluded in question 8, describes the careful examination that I shall give to Board and circuit court precedent as well as, of course, that fashioned by the Supreme Court. As I explained to you, I will approach Board precedent with a presumption of correctness. Since there are a number of issues which may come before the Board involving employee involvement programs, it is inappropriate to comment beyond my writings, my statement on October 1, and my answers provided to Senator Kassebaum. With regard to information disclosure, I reiterate my answer provided to you on October 1 where I expressed my view that I would have a view similar to Chairman Stephens. However in this area as well as others, I will decide cases based upon the relevant facts and law.

8. In deciding whether any particular Board precedent should be overturned, I will consider a variety of factors. A non-exclusive list of such factors would include the following:

First, as I have noted, I would enter the inquiry with a presumption that any given Board precedent should not be overturned, absent substantial reason. This factor is based on my belief that stability of legal rules is an important value, and that the Board's credibility depends in part on the ability of parties to rely on the Board's rules.

Second, I would fully examine the legal reasoning of the precedent and all other arguments in favor of or against the correctness of its interpretation of the Act. In this way I would determine whether I believed it to be correct, and, if incorrect, I would determine the nature and seriousness of the error in relation to the provisions and the purposes of the Act.

Third, I would examine all court and Board precedents as well as scholarly articles and books on this and on related issues, not only as part of my research described above, but also to determine how important the precedent in question has been in the overall development of the law. Similarly, I would examine whether the precedent in question gives the kind of rule on which legitimate reliance interests have arisen.

In discussing the overruling of Board precedent, one last point should be mentioned. The Board does not decide which issues come before it, since under this Act the authority to issue complaints for violations of the Act rests with the General Counsel. As a consequence, it is often the case that a prior Board decision leads a General Counsel to refrain from issuing complaints, with the result that the issue of the continued validity of the prior decision is never presented to the Board.

9. I do not believe that it is appropriate for me to comment on this particular issue, which could come before the Board. I shall consider the issue on the basis of all the facts and relevant law, which now includes the Dubuque decision, 303 NLRB 386 (1991), enforcement granted, 143 LRRM 3001 (D.C. Cir 1993), which has overruled the Otis Elevator (II) case to which you refer. My analysis, if the issue comes before the Board, will generally follow the approach outlined in response to the prior question.

10. I think that you are referring to Agenda, page 193, in this connection. If you will note the second sentence, which speaks of temporary replacements, follows a first sentence which discusses what Congress can do. In no way does it relate to what the Board can do. Accordingly, this change in the law cannot be accomplished without a change in the statute, because Mackay clearly gives employers the right to use permanent replacements in economic strikes.

11. In my judgment, the test should be whether the matter invoked by one side is capable of economic verification. This would contribute to the rational discourse that one would hope for in the collective bargaining process. Beyond these comments, it is inappropriate for me to say more because the matter may come before the Board as it has come before the Board in the recent past.

12. Again, my view is generally the same as that stated by Chairman Stephens in his dissent in Neilson Lithographing. Of course, I would consider such a case on the basis of all the relevant facts and authorities.

13. No. In my testimony I was referring to the ways in which more employees could vote in secret ballot box elections established by the Board. See particularly my comments in the penultimate paragraph on page 159 of Agenda.

Follow-up Questions for Professor William Gould  
from Senator Orrin Hatch  
Oct. 18, 1993

1. In your written responses to question number 7, you state that "with regard to information disclosure, I reiterate my answer provided to you on Oct 1 where I expressed my view that I would have a view similar to Chairman Stephens." In response to a question by Senator Kassebaum and to my question number 12, you also specifically cite Chairman Stephens' dissent in Nielsen Lithographing Co. as an example of your agreement with him. Do you also agree with Chairman Stephens' concurrence in Concrete Pipe and Products Corp., 305 NLRB 152 (1991)?

1. As a general proposition, the concurrence properly describes the law fashioned by the Supreme Court which all members are obliged to follow. The key question in Chairman Stephens' view related to whether the particular words used by the employer in that case, without more, placed at issue the financial health of the business. Because questions relating to the precise application of the relevant standard are likely to come before the Board in the future, and in any given case their resolution may depend on a variety of factual and contextual issues, I do not believe that it would be appropriate for me to express a more detailed view at this point.

2. In your response to Senator Durenberger's first question, you cite your previously stated support for "a more vigorous use of the injunction provisions of the statute under Section 10(j)."

(a) Please explain and detail in what respects, if any, you feel that prior use of 10(j) has not been vigorous enough.

2. (a) I cannot describe my view in any more detail than I have provided at pages 160-162 of Agenda. As I state there, I am "puzzled" by the decline in section 10(j) authorizations. My suggestion that use of 10(j) may have been insufficiently vigorous is based upon the statistics set forth in the above-noted pages. But as I indicate in Agenda, a full and complete answer to this question must await further research because of the multiplicity of factors which could be involved.

(b) Please explain and detail what you mean by a "more vigorous use."

(b) I have not described this in any more detail than I have in Agenda and I have not formulated a further view at present.

(c) It is my understanding that the Board decides whether to authorize or not to authorize the General Counsel to seek 10(j) injunctions only in cases in which the General Counsel has requested such authorization. Does your intention to make more vigorous use of 10(j) envision any change in this regard?

(c) Under current Board practice, authorization is appropriate only when the General Counsel makes a request. I have not formulated a point of view on any issues relating to the Board's delegation of authority to the General Counsel in this area, and I would want to have the opportunity to consider and reflect upon this matter.



## QUESTIONS FROM SENATOR STROM THURMOND (R-SC) FOR WILLIAM GOULD

1. Mr. Gould, as you know, double breasting, or dual shops, in the construction industry involves the practice by a contractor of operating two or more subsidiaries, at least one of which is union and another is non-union or open shop. Do you feel the decisions issued by the National Labor Relations Board which acknowledge the legality of this practice were correctly decided? So long as the two subsidiaries are legally and properly separate, do you have any problem with both subsidiaries operating in the same geographic area? Should the union contract extend to the open shop?
2. Mr. Gould, it is my firm belief that it is the role of the Board to interpret the National Labor Relations Act and not to legislate on the subject of labor relations. Would you please give me your thoughts on policy making powers of the Board?
3. Mr. Gould, in your book Agenda for Reform, you express that you believe authorization cards should be preferred over secret ballot elections to certify unions. In view of the fact that the signing of authorization cards can be influenced by outside pressures, would you please explain your views on this issue?
4. Mr. Gould, please explain whether you would support requiring that a union conduct a secret ballot vote of its membership prior to calling a strike?
5. Mr. Gould, with regard to the purchasing of a company, you have stated that "the obligation to assume the old collective bargaining agreement should be imposed upon any purchaser as a condition of purchase." I believe this policy would discourage potential buyers from purchasing troubled companies. Would you please comment?
6. Mr. Gould, in your book Agenda for Reform, you argue that permanent replacement of strikers should be banned. You

also write about the difficulty of knowing whether a strike is of the unfair labor practice or economic variety. As you know, under current law, an unfair labor practice ruling by the Board entails reinstatement and back pay. A ruling that a strike is economic leaves strikers with a place on the preferential rehire list. Since you appear critical of the latter result, how can you guarantee that your view of the facts in a given case will not be colored in favor of the unfair labor practice finding?

7. Mr. Gould, you have stated that "Amendments to the [National Labor Relations] Act that allow for cooperative relationships between employees and the employer are desirable." However, you have stated that the NLRB's Electromation decision was a narrow decision. Why should the Board have found a violation when the NLRB specifically found that the employer did not know about the organizing drive when it established the management-employee committees?

#### ANSWERS TO SENATOR STROM THURMOND'S QUESTIONS

1. This is a matter which has and will likely come before the Board in the future and it is therefore inappropriate for me to comment beyond the answer I have given to Senator Kassebaum's question 27.
2. Only Congress can legislate and make policy. The Board must interpret the National Labor Relations Act within confines established by Congress - particularly in the context of 60 years of litigation which has provided numerous authoritative constructions by the courts and prior Boards. Where there are ambiguities by virtue of the broad language of the statute, the Board must necessarily resort to the general policies contained in the statute, as well as to the relevant legislative history.
3. As Chairman, I would follow relevant Supreme Court authority relating to authorization cards, see, e.g., NLRB v. Gissel. As Chairman of the Board, I cannot depart from this authority established for me by the Court.

With regard to my proposals in Agenda, I proposed that authorization cards only be used in accordance with the Canadian system which required - at least until 1992 at the time of the completion of the manuscript - the payment of dues and the promise to continue to pay dues. My view has been that peer pressure is much less likely to play a significant role in interfering with employee free choice in these circumstances and that this proposal would promote free choice.

4. I support the conduct of a secret ballot vote with membership prior to calling a strike. See Agenda, p. 201 in particular. However, as Chairman of the Board, I cannot require such a ballot since the statute does not provide for that at present. Only Congress can change the law in this regard.

5. My answer to this question depends upon the circumstances under which the presumption which I advocate on page 174 could be rebutted. I have not expressed a view on this matter and have not formulated a position. See also my answer to Senator Kassebaum's question 13.

6. I intend to consider all unfair labor practice issues on the basis of the relevant facts and law. Just as my arbitration opinions and awards have not been influenced by views which are contrary to that set forth in collective bargaining agreements, so also will I interpret this statute in accordance with the intention of Congress. I have discussed this issue at length in my answer to Senator Kassebaum's question 1.

7. There are numerous factors which the Board and the courts take into account in determining the question of whether unfair labor practice violations have been committed in the Electromation arena other than knowledge about a particular organizing drive. My proposals about amending the Act in Agenda are in part focused upon knowledge about an organizing drive. Of course, the job description of NLRB Chairman requires that I interpret existing law solely on the basis under which Congress has written it. See also my answer to Senator Kassebaum's question 19.

#### Additional Questions From Senator Durenberger

##### 1. Expedited NLRB Review

In March, I introduced "The Justice for Permanently Displaced Striking Workers Act of 1993," S. 598,

The bill would amend the National Labor Relations Act ("NLRA") to require administrative law judges and the National Labor Relations Board ("NLRB") to adhere to timetables for adjudicating unfair labor practice charges of bad faith bargaining where permanent strike replacements have been hired. A recent GAO study found that the median time in FY89 to decide ULP cases was 300 days, compared with 133 days at the start of the decade, 1980. The median interval between filing a charge and judicial enforcement was over 3 years in FY88. Under my bill:

- ALJ's must hold hearings within 60 days after a complaint is filed;
- ALJ's must reach decisions 60 days after holding hearings;
- Appeals of ALJ decision must be filed within 30 days after a decision is reached (responding party has 15 days); and
- The NLRB must reach a decision 90 days after briefs are filed

The bill was referred to the Senate Labor Committee with no subsequent action.

In Agenda for Reform, you also criticize the NLRB's excessive delay in adjudicating unfair labor practice cases, and cite this as one of the factors contributing to the decline in

union win rates in representation elections over the last decade (Agenda for Reform, pages 158-162). As I pointed out at the hearing, the problem of delay in adjudicating unfair labor practice charges is not a recent phenomenon.

I am interested in your thoughts on S.598. Can you also identify other areas where you would like to see case-management reform at the NLRB? Which of these changes would require Congressional action, and which could be accomplished through administrative rulemaking.

## 2. Mini-Unions [e.g. Workforce Balkanization]

Under current law, a union must gain support from 51% of the workforce in order to gain representation rights. This principle of majority rule is basic to current federal labor law.

You have advocated a change to this system. In your view, when 20%-30% of the workforce desires union representation, a union should be allowed to represent that segment of the workforce.

In Agenda for Reform, you write:

"The [National Labor Relations] Act should be amended so as to allow nonmajority organizations to represent employees and to be consulted and share information about employer decision making that affect employment conditions where 20 or 30 percent of the employees have petitioned the Board to this effect. Under such circumstances consultation and communication should be mandated." Agenda for Reform, p. 141.

What type of consultation with the employer do you believe should be mandated when 20% of the employees choose the union? Should bargaining be mandated? What information, specifically, should employers be required to disclose under these circumstances?

Also, wouldn't this reform mean that unions would win every organizing campaign because when 80% of employees reject the union, the union still acquires the right to represent the remaining 20% of employees?

## 3. Role as Chairman

As the title of your book indicates, you are by nature a reformer. From a "reformist" standpoint, how would you approach your role as NLRB Chairman differently than you have your role as an academic? As Chairman, would you describe your adjudicative philosophy as "activist," "strict constructionist," "moderate," or what?

## ANSWERS TO ADDITIONAL QUESTIONS FROM SENATOR DURENBERGER

1. As I indicated to you and Senator Jeffords, I am supportive of any legislation or administrative reform which would expedite the Board's administrative processes. I view the problem of delay to be an extremely serious one and, as I indicated in my October 1 statement and testimony, my first order of business as Chairman of the National Labor Relations Board would be to find ways, including the formulation of timetables, to address this problem.

Although I indicated in my responses to you and Senator Jeffords regarding the issue of legislation giving priority to unfair labor practice charges relating to permanent replacements, that I am supportive of any legislation which would expedite the Board's administrative process, I do not believe that it is appropriate for me to comment upon specific legislation that has not been the subject of extensive study and writing on my part, in the context of confirmation hearings. As I have indicated to you and all of the other Senators who have posed questions to me, should I be confirmed, I would be pleased to study any specific legislative proposals and present my views on the labor legislation at an appropriate time should the Committee determine that they wish to solicit my views as NLRB Chairman on this subject.

The problem of unfair labor practice litigation in the context of permanent replacements, where a substantial period of time elapses during which the strikers and employers do not know their status - i.e., whether they are in the economic or unfair labor practice category - is a serious problem and creates a substantial uncertainty for both sides as to their rights, obligations and potential liabilities. This is why I have advocated in Agenda at p. 172 that the statute be amended to allow the Board to issue advisory opinions on such issues. As I have noted, the advisory opinion should allow the Board to advise the parties "...in advance what the status of the item on the table is (i.e., whether mandatory or nonmandatory. . .)" so that the parties may bargain intelligently afterwards and that uncertainty can be reduced.

Again, this reform would take a statutory amendment. There is nothing that the Chairman of the Board can accomplish in this respect on his or her own initiative.

On pages 161-162 of Agenda, I advocate changes relating to the delay problem which can be accomplished without Congressional legislation: (1) adherence to firm timetables for both representation and unfair labor practice proceedings through regulations devised by the Board; (2) an extension of the Board's rulemaking authority to other appropriate units beyond the hospital industry; and (3) a more vigorous use of the injunction provisions of the statute under Section 10(j).

Further, as I noted in my statement on October 1, I intend to explore the formulation of new discovery and settlement procedures which would be designed to both resolve unfair labor practice cases without litigation and to diminish the problem of delay. Again, this is a step which can be taken by the Board through its regulations without legislation.

There is an additional concern that I would raise relating to the issue of delay. Obviously, the ability of the Board to act with dispatch is in part a function of the Board's budget. I would note that Chairman Edward Miller raised this issue with the Committee during his confirmation hearings in 1970. See Hearings Before the Senate Committee on Labor and Public Welfare on the Nomination of Edward B. Miller to be a Member of the NLRB, 91st. Cong. 2d Sess. 20 (1970). Should the Senate confirm me, my hope would be that budgetary concerns which might flow from the need to expedite which stem from legislation or administrative reforms should be examined at an appropriate time.

2. See my answer to Senator Kassebaum in Question 16.

3. In large measure, this question has been answered in response to the first question put to me by Senator Kassebaum. I would decide cases, as I have as an arbitrator, within the parameters established for me by Congress under existing legislation and my obligation would be to interpret the law as it is currently written.

As Chairman, my adjudicative philosophy would be to ascertain Congressional intent through (1) the text of the statute, (2) the policies of the statute, (3) prior authorities, and (4) the relevant legislative history. Of course, additionally, I would

want to look at the total integrity of the statute in order to determine Congressional intent. My responsibility would be to accurately interpret the Act by determining the intent of Congress as reflected in the above materials.

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The Hon. George J. Mitchell  
U. S. Senator  
176 Russell Senate Office Building  
Washington, DC 20510

Dear George:

With the Senate about to begin confirmation proceedings on President Clinton's first nominee for the National Labor Relations Board, Professor William B. Gould, IV, who is also the President's designee for Chair of the Board, I wanted to share my thoughts regarding this distinguished scholar.

In over 25 years of experience in labor relations law representing the Maine AFL-CIO and various constituent unions within the Maine AFL-CIO as well as various international unions in a variety of employment relations proceedings, I have been forced to reflect long and hard on the changing structure of labor relations in this Country and on the role of the National Labor Relations Board in meeting the new challenges in this area.

The position of the Chair of the National Labor Relations Board is critical to the successful functioning of the Board and will play a critical role in the level of cooperation between American business and American workers and hence, the productivity of America and to a large extent, the standard of living of our people as America positions itself for the 21st Century. Professor Gould is an eminent scholar and a deep and practical thinker regarding America's successes and failures in labor-management relations. His most recent publication, Agenda for Reform: The Future of Employment Relations and the Law, is the best single exposition regarding where we are, how we arrived where we are, and what we must do both in terms of NLRB action and potential legislative action to move towards the enhancement of labor-management relations and the benefits which flow from an employment climate based on mutual respect and a shared community interest. President Clinton has chosen in Prof. Gould, an individual who demonstrates a comprehensive understanding of the problems we now face in the labor relations arena, the shortcomings of our current policies and current Board structure, and represents also a commitment to move to a different plane of labor-management relations based on the recognition that continuing "the old ways in new days" approach is a lose-lose option not only for Labor and Management but for our economy and hence, our society.

Professor Gould evidences not only a high level of understanding of complex and sometimes inconsistent judicial and Board opinions under the National Labor Relations Act, but also a fundamental commitment to the historic values of worker participation to the economic as well as the political spheres that underlie the Act itself. Those values regarding labor-management collaboration and the dignity of individual human beings are the moral basis for a decent and mutually beneficial relationship between Labor and Management.

Professor Gould takes care to outline very thoroughly in his book the various areas for internal reform within the Board. These are critical issues which can be promptly addressed without the need for Congressional action to assure that labor-relations law in this Country changes to meet the new

demands of this decade and the next century. The NLRB can act administratively to reduce and even eliminate delays both on election results and on unfair labor practice charges in its review of administrative law judge recommended decisions.

The current delays result in large part from an historic and continuing emphasis on the adjudicatory aspect of the Board's role and on the consequent need to interpret and reinterpret conflicting and confirming precedents in both the elections area and the unfair labor practices area. Professor Gould recommends eliminating these delays and lending both speed and predictability to Board actions by promulgating under the Administrative Procedures Act rules to enhance resolution without adjudication and to narrow the issues in adjudication rather than continuing the present practice of relying almost exclusively on individual adjudications. Those of us who practice before the Board are overwhelmed by the volume of case law. The Board quite frankly is swamped with individual adjudications. The volume of cases derives partially from the statutory provision which makes the administrative law judges' actions recommendations rather than final actions on unfair labor practices and partially due to the structures for handling unit determination issues in election cases. The Board has begun the process advocated by Professor Gould in the health care field by promulgating regulations to simplify and make more predictable unit determinations. The Board should follow on this initial attempt by expanded and even more thoroughly developed unit determination criterion in other industries.

President Clinton's nomination of Professor Gould, considering his eminent scholarship, high legal talent and his insightful thinking regarding Board reform, presents the labor-management community and the Nation with an unusual opportunity to make real the promise of our labor relations law by increasing the predictability of decisions and drastically cutting decision time. Professor Gould has brought new thinking to this area grounded in important traditional, democratic values but directed towards change which will move labor-relations in this Country away from a system based solely upon adversarial combat and towards a system grounded in mutual rights and mutual responsibilities but which encourages and builds upon labor-management collaboration rather than conflict. He is eminently qualified as a choice for Chair of the National Labor Relations Board. The leadership he offers will be a long overdue voice for change.

Respectfully,



Patrick N. McTeague  
Counsel,  
Maine AFL-CIO

PNM:cr

cc: Charles J. O'Leary, President  
Maine AFL-CIO

The CHAIRMAN. The committee stands in recess.  
[Whereupon, at 11:54 a.m., the committee was adjourned.]

